

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2405

In The
United States Court of Appeals
For The Second Circuit

GERALD L. HERZFELD,

Plaintiff-Appellee,

- against -

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,

Defendant-Appellant.

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,

Third-Party Plaintiff-Appellee,

- against -

ALLEN & COMPANY, INCORPORATED and ALLEN & COMPANY,

Third-Party Defendants-Appellants.

ALLEN & COMPANY and ALLEN & COMPANY INCORPORATED,

Third-Party Counterclaimants-Appellants,

- against -

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,

Third-Party Counterclaim Respondent-Appellee.

JOINT APPENDIX

Volume IV, pp. 901a - 1117a

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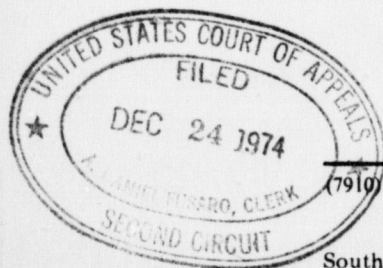
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1
2 A I am certain.

3 Q Who placed the telephone call of December 11th?

4 A I thought I had explained how it started.

5 I will explain again, if you like.

6 Q Please just answer who placed the call.

7 A I have no idea who placed the call.

8 Q Was it placed from New York or from Los Angeles?

9 A It was my understanding that the call originated
10 in New York.

11 Q Are you familiar with SEC Accounting Series
12 Release No. 95?

13 A Yes.

14 Q Was it in force and followed by Lavenhol at
15 the time of this audit?

16 A In SEC engagements, yes.

17 MR. POLLACK: I offer it in evidence as A-26.

18 MR. CRACO: I object to its receipt in evidence,
19 your Honor. There is no testimony that this was an SEC
20 engagement and, therefore, there is no basis for its in-
21 troduction in evidence at this time. In point of fact,
22 it was not an SEC engagement, it was a private placement.

23 MR. POLLACK: Mr. Lipkin testified on his
24 deposition --

25 MR. CRACO: I have not finished.

He said it was in connection with a private placement, so the testimony goes.

THE COURT: I will take it for what it is worth. I am quite aware of it.

MR. POLLACK: I read from page 111 of the deposition of Mr. Lipkin:

"Q Did you consider SEC Account Series Release No. 95 in reaching your conclusion as to the type of an opinion you would give in connection with your audit of the Firestone Group" --

THE COURT: I just admitted it, Mr. Pollack. What are you trying to do, talk me out of it?

MR. POLLACK: I am trying to point out its relevance in the context of this --

THE COURT: I just admitted it on the theory that it must have some relevance.

MR. CRACO: What is the number, A-26?

Q Are you familiar with the American Institute of Certified Public Accountants?

A Yes.

Q Are you familiar with the Committee on Land Development Companies of the American Institute of Certified Public Accountants?

A Yes.

Q Are you familiar with a publication of that committee entitled Accounting For Retail Land Sales?

A What is the date of that publication?

Q The date of that publication is 1971.

A Yes, that I'm familiar with.

Q Are you familiar with the portion of that booklet entitled Recording of Sales?

MR. CRACO: At this time, your Honor, I am going to interpose an objection on the grounds of irrelevance and immateriality.

I will concede for the record that the accepted accounting principles were changed between the time of this transaction and the time of this trial, and it seems to me utterly inappropriate to invoke those --

THE COURT: Probably changed during the trial. They change every case.

MR. CRACO: I mean the ones --

THE COURT: I will take them for what they are worth. As I indicated earlier, in my judgment they are not worth much.

MR. POLLACK: I do not accept the concession by Mr. Craco that it changed.

I offer as A-27 the portion of that booklet entitled Accounting For Retail Land Sales, and specifically

the portion called Recording of Sales, Paragraphs 15 and 16.

Your Honor, has that been received in evidence?

THE COURT: Yes.

(Plaintiffs' Exhibit A-27 received in evidence.)

Q Mr. Lipkin --

A Pardon? What's my name now?

Q Excuse me. Mr. Chazen.

I show you A-5, the report, financial statements, and ask you to concern yourself solely with the first page, specifically the words "Subject to the collectibility of the balance receivable on the contract of sale," and ask you what the qualification means.

A What the qualification means is that it was the auditor's concern in this case that because of the circumstances surrounding the transaction, including the amounts required to be paid initially and the fact that it was a non-recourse note and the fact that it was a purchase money mortgage, that all of these considerations led the auditors to believe that they were in no position to give an opinion on the financial statements, including this receivable because of the possibility of its failure to be collected.

THE COURT: Mr. Pollack, how much longer do you expect to be?

MR. POLLACK: One more question, approximately.

Q Is it intended to cast doubt on whether or not the transaction constituted a sale?

A It is not.

MR. POLLACK: No further questions.

MR. HAIMOFF: In the interest of expediting the trial, your Honor, I'll not add anything at this point.

MR. CRACO: No redirect.

THE COURT: You are excused.

(Witness excused.)

MR. CRACO: Mr. Lipkin.

A R N O L D L. L I P K I N, recalled.

THE COURT: You are still under oath, Mr. Lipkin.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. CRACO:

Q Mr. Lipkin, would you state your educational and business background for the Court, please?

A I am a graduate of Northwestern University with a degree in Business Commerce and I have a JD from Loyola University in Chicago.

I have also been a partner in Laventhol, Krokstein or its predecessor for approximately 10 years.

Q Are you a member of the Bar of any State?

A Yes, sir.

Q Which State?

A Illinois.

Q I want to take you to the latter part of 1969

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and ask you whether you became a partner in charge of the audit which has been the matter of discussion in this case?

A Yes, sir.

Q Do you recall how it came about that you were so engaged?

A Richard Firestone called me some time early -- well, probably late 1968, to indicate that they were -- that a new company was being formed that would eventually go public and asked if Lavenhol, Kerkstein could become the public accountants for that company.

Q Thereafter, did you perform auditing and accounting services for the Firestone Group?

A Yes, sir.

Q Now, turning to the audit which is the subject of this litigation about which you have already been questioned, when did the necessity for such an audit first come to your attention and how?

A Some time in mid-November, Mr. Firestone called and indicated that there would be need for an audit as at November 30.

Q Did he tell you in connection with what that audit was required?

A I think initially he did not. Initially, I thought it was in connection with a registration.

Q What did you do with regard to that audit to gear up and get it underway?

A I spoke to Mr. Schwalb, who was the manager on the job. I asked him to contact --

Q Before you go any further, was Mr. Schwalb an employee of Laventhol?

A Yes, he was.

Q How long had he been?

A Approximately three years at that time, I believe.

Q Was he a manager at that time?

A Yes, sir.

Q Just very quickly, what is a manager in the parlance of Laventhol?

A A manager has the status of an employee who runs the engagement and is responsible for the field operation review and the day-to-day operation of that particular audit.

Q Would you describe what the ordinary relationship between the audit partner in charge of an engagement and the manager is in the prosecution of an audit?

A The manager is responsible for the day-to-day prosecution of it. It is the responsibility of the partner to supervise the overall concepts, ideas and to discuss any basic problems or any problems which appear to be

unusual with the audit manager.

Q In the ordinary course of practice at Laventhol, is it the function of the audit partner to review all the books of original entry of the company being audited?

A No, sir.

Q Is it the obligation of the partner in charge of the audit to review each and every one of the documents which is procured for the purpose of verifying transactions reflected on the books?

A No, sir.

Q In the ordinary course of Laventhol's practice, does the partner rely upon the manager for the prosecution of that kind of an activity?

A Yes, sir.

Q Is it the responsibility of the manager to report his findings from time to time to the partner in charge?

A Yes, sir.

Q Was this the arrangement under which the audit of the Firestone Group went forward?

A Yes, sir.

Q In November of 1969?

A Yes, sir.

Q Did you give Mr. Schwalb certain instructions

at the outset of the audit?

A Yes.

Q What were those instructions?

A To meet with Mr. Wadley, to prepare a program, to make arrangements for the staffing of the job and to commence the audit as expeditiously as possible.

Q You know Mr. Wadley?

A Yes, sir.

Q And you knew Mr. Firestone?

A Oh, yes.

Q Did Mr. Schwalb subsequently report to you whether he had accomplished what you had instructed him in this respect?

A Yes, sir.

Q What did he say?

A He prepared a program. He also indicated that he had met with Mr. Wadley and told Mr. Wadley the papers that he wanted him to prepare, schedules, documents, availability, confirmations, so that we could expedite the conduct of the audit.

Q Would you tell us what happened next in connection with the audit?

A Well, Mr. Schwalb reported to me day to day on operations but he did indicate subsequently, towards the

latter part of November, perhaps very early in December, that there were transactions in there that he would like to discuss with me.

Q Let me interrupt this line for a moment to ask whether Mr. Schwalb is still employed by Laventhol?

A No, he is not, sir.

Q Where is he?

A He is in business for himself in Hawaii.

Q Would you tell us when Mr. Schwalb reported to you that he had certain matters that he wanted to discuss with you, did you then discuss those matters with Mr. Schwalb?

A Yes, sir.

Q What matters were they?

A He had a -- he discussed the transactions which we have called the Ruderian transactions here, the contract to acquire properties and the contract to sell such properties.

MR. POLLACK: Objection. Hearsay, now it be stricken.

THE COURT: I'll take it for what it is worth. I think it is hearsay.

MR. CRACO: If your Honor please, I am offering it solely for the purpose of establishing what Laventhol

1
2 did in the prosecution of its audit.

3 MR. POLLACK: I respectfully object to this.

4 THE COURT: Well, that's what I am taking it
5 for, what it's worth. I think it may be hearsay. It may
6 not be.

7 Certainly Laventhol is entitled to establish over-
8 all what they did, what inquiries they made.

9 Q What report was made to you by Mr. Schwalb with
10 respect to these transactions?

11 MR. HAIMOFF: May we have a date, your Honor?

12 Q I thought we established that, but do you remember
13 approximately when the conversation that you are about to
14 relate with Mr. Schwalb took place?

15 A I think some time the very beginning of December.
16 I can't remember the exact date. Some time very soon after
17 commencement of the audit.

18 Q Go ahead and tell us what was said in the course
19 of that conversation.

20 MR. POLLACK: I renew the objection on the grounds
21 of hearsay.

22 THE COURT: Overruled.

23 A Mr. Schwalb discussed the contract of sale with
24 Monterey Nursing Home. He discussed the fact that there
25 was a contract for sale with Monterey and he --

THE COURT: We are talking about what Schwalb did?

MR. CRACO: What Schwalb reported to Lipkin.

THE COURT: This is an employee of Lavenhol.

MR. CRACO: Your Honor, there is an allegation -- let me back up a bit.

When Mr. Lipkin was put on the stand by Mr. Pollack, he was asked a series of questions, did you do this, did you do that, and the other thing, and I got up at the outset of that and said, "Does the word 'you' in those questions refer to Mr. Lipkin, personally, or to Lavenhol, generally," and it was said that it referred to --

THE COURT: Obviously we are talking about Lavenhol generally, but this is a different thing from the kind of evidence we have got here.

We have one witness testifying to what another witness heard from still a third party.

No. Here it is hearsay. What one witness heard from a man who is not a witness is hearsay.

MR. CRACO: In the course of the prosecution of the audit.

Q Let me ask you, Mr. Lipkin, was Mr. Schwalb your source of information in making the judgments that you made or a source of information in making the judgments that

you made in the course of the audit?

A Yes, sir.

Q Did you rely on information received by him as a result of his having gone out and done the day-to-day field work?

MR. POLLACK: Objection. There is no evidence that he went out and did day-to-day field work.

MR. CRACO: I am trying to find out if he did.

THE COURT: You can bring him here. You can bring him from Hawaii. You can do it in just a few hours.

MR. CRACO: Your subpoena doesn't reach him there. I can't produce him --

THE COURT: I don't know why not. It's the United States.

Q Mr. Lipkin, did Mr. Schwalb report to you, without telling us the substance of that report, about certain transactions?

A Yes, sir.

Q As a result of that conversation, did you make any decision with regard to the audit steps that Laventhol should then take?

MR. POLLACK: Objection to the form of the question.

THE COURT: Overruled.

1
2 A Yes, sir.

3 Q What decisions did you make and what steps did
4 you take as a result of it?

5 A I had Mr. Schwalb furnish copies of the contracts
6 to me. I contacted one of my partners, Mr. Leonard,
7 who is an expert in the hospital field, to discuss the
8 reasonableness of the compensation called for in those
9 contracts.

10 MR. POLLACK: Objection. Hearsay. There is
11 no foundation that Mr. Leonard is an expert in the hospital
12 field.

13 MR. CRACO: He didn't testify what Mr. Leonard
14 said.

15 THE COURT: Proceed.

16 A I contacted Mr. Eli Boyer, who is a partner of
17 ours --

18 Q We'll come to that in a moment.

19 Q Did Mr. Schwalb give you certain documents as
20 a result of your request?

21 A Yes.

22 Q Are they the contracts which have been marked in
23 evidence in the course of this trial and shown to you,
24 Exhibits 20, 21, 22?

25 A Yes, sir.

Q Did you examine those contracts when you received them?

A Yes, sir.

Q Having examined them, what if any steps did you take to verify their authenticity?

MR. POLLACK: Objection to the form of the question, your Honor.

THE COURT: Overruled.

A I asked Mr. Firestone, or I asked Mr. Schwalb, I can't recall who, to furnish me with some indication as to the nature of the contracts and the documentation. I asked Mr. Boyer, who was a partner --

Q Before you go to Mr. Boyer, did you talk about the contracts with Mr. Firestone?

A Yes. I reviewed the contracts with Mr. Firestone.

Q Was this the early part of December or the late part of November, 1969?

A I believe early December.

Q Would you tell us what you said to Firestone and he said to you about those contracts?

A I asked Mr. Firestone the details of the contracts. I asked him what they represented, what was involved, were they legitimate.

I also asked him about the buyer, the people, Rudorfan group, who were buying the property from him,

1 who they were, what he knew about them, and whatever
2 information that he could furnish me to help me establish
3 the legitimacy and the correctness of this particular
4 transaction.
5

6 Q What did he respond to all those questions?

7 A He responded that they were correct, that they
8 were legitimate, these were arm's-length transactions.

9 Additionally, he told me or he furnished a memo
10 to me indicating references that I could contact as well
11 as the fact that I could contact Mr. Ruderman directly.

12 Q References with respect to Mr. Ruderman?

13 A Yes, sir.

14 Q Go ahead. What else did he tell you about the
15 transaction?

16 A He assured me that they were arm's-length trans-
17 actions. He assured me that he and Mr. Scott were moving
18 right ahead on this contract and he assured me that as far
19 as -- in his opinion, maybe that's not the correct word,
20 probably, but he assured me that these were legitimate,
21 arm's-length contracts in the normal course of the Firestone
22 business.

23 MR. POLLACK: Your Honor, at this point, I would
24 move to strike everything the witness said about his
25 alleged conversation with Mr. Firestone on the subject.

First of all, it was all out of the presence of Allen and not binding on Allen and, second of all, I think it constitutes hearsay of a kind that has previously been kept out of this trial.

THE COURT: Overruled.

Q Did you personally examine the contracts?

A Yes, sir.

Q Did you scrutinize them from the standpoint of determining how they should be treated in connection with the audit?

A Yes, sir.

Q In that connection did you, among other things, apply your judgment and experience as a lawyer to their effect?

A Yes, sir.

Q Did you go forward with any further steps to inquire into the bona fides of the transaction represented by these two contracts?

A Yes, sir.

Q What further steps did you take?

A No. 1, I talked to Mr. Chazen about the accounting treatment on these contracts.

Q Before we got to the accounting treatment, did you do anything further to verify the intention of the

parties with respect to that? Particularly, did you have any conversation with Mr. Boyer?

A Yes, sir.

Q Would you tell us what your conversation with Mr. Boyer was?

Let's see if I can abbreviate this.

MR CRACO: Your Honor, if you will permit me, it may be irregular, but let me ask this:

Q Were you here in court this morning when Mr. Boyer received his recollection of your conversation with him and the conversation that he thereupon had with a Mr. Rudorjian?

A Yes.

Q Did you hear that testimony?

A Yes.

Q Let me ask you whether you presently recall being present at the conversation that Mr. Boyer mentioned in his testimony?

A Yes, I was.

Q Do you have a recollection of whether the conversation was conducted on a closed phone or on the speaker phone?

A On a speaker phone.

Q So that you heard what Mr. Rudorjian said as well

1
2 as what Mr. Boyer said, is that correct?

3 A Yes, sir.

4 Q If I were to ask you the same questions about
5 that conversation that I put to Mr. Boyer, would your
6 answers be in substance the same?

7 A Exactly.

8 Q Having concluded that matter, did you make any
9 other investigation of Mr. Rudorlan's financial responsi-
10 bility?

11 A I called up three of the bankers who were listed
12 in Mr. Firestone's memorandum to me as people who could
13 be called to discuss Mr. Rudorlan's standing in the com-
14 munity.

15 Q Which bankers were they? Do you recall?

16 A I believe there were two gentlemen from the
17 Santa Monica Bank and a man, Peter something or other, from
18 another bank.

19 Q What questions did you put to them and what
20 answers did you get from them?

21 A I told them that --

22 MR. POLLACK: Objection. Hearsay.

23 THE COURT: I'll allow it.

24 A I told each of them that I had been given
25 permission by a client of ours to contact them in connection

1 with Mr. Ruderian, his general standing and what they
2 thought of his creditworthiness and what his general
3 reputation was as a businessman with whom they had been
4 dealing.
5

6 Q What response did you get?

7 A Each of them gave me an unqualified, enthusiastic
8 response that he was a very legitimate, outstanding, sub-
9 stantial business person.

10 Q Did you cause the financial statements of
11 Continental Recreation to be examined by Mr. Schwalb?

12 MR. POLLACK: Objection, your Honor.

13 THE COURT: Overruled.

14 A He reviewed those statements, yes, sir.

15 Q Did he report on those statements to you?

16 A Yes, sir.

17 MR. POLLACK: How can this witness testify that
18 Mr. Schwalb reviewed the statement? Mr. Schwalb --

19 THE COURT: I allowed him to testify. That's
20 how. Proceed.

21 Q did Mr. Schwalb, in the course of reporting to
22 you, advise you about what those statements reflected in
23 regard to Continental's net worth?

24 A Yes, sir.

25 Q You were aware of that during the course of the

procedures that you have been describing, is that correct?

A Yes, sir.

Q Did there come a time when you turned to anyone else in Laventhol for advice and counsel with respect to this transaction?

A Yes, sir.

Q To whom was that?

A Mr. Chazen.

Q What did you discuss with Mr. Chazen?

A I discussed the accounting treatment of this transaction and the profit on the transaction.

Q In the course of that conversation, is it your recollection that you did or you did not bring to Mr. Chazen's attention the contractual documents that you are holding in your hand?

A My best recollection is that I did.

Q Again, to abbreviate this examination, were you in court this morning when Mr. Chazen testified about your conversation with him in which you solicited advice with respect to the handling of that item?

A Yes, I do.

Q If I were to ask you the same questions I put to Mr. Chazen about your communications with him, would your answers with regard to that conversation be substantially

the same? I'm talking about only your conversations with Mr. Chazen.

A Yes, sir.

Q In summary, you had a conversation with regard to the deferral of a portion of the income and the standards to apply in the course of taking a portion of the income into current income. Is that a fair summary?

MR. POLLACK: Objection.

THE COURT: Overruled.

A That is quite right, sir.

Q Did you also participate in a conversation with a Mr. Zemon?

A Yes, sir.

Q Did you hear this morning Mr. Chazen describe that conversation?

A Yes, I did.

Q Were you present at it?

A Yes, I was.

Q If I were to put to you the same questions I put to Mr. Chazen this morning about his conversation with Mr. Zemon, would your answers about that conversation be substantially the same?

A Yes, sir.

Q Did there come a time when you were present at

1 a conversation on the telephone with a Mr. Julius Borah?

2
3 A Yes, sir.

4 Q Was that prior to December 6, 1969?

5 A Yes, sir.

6 Q Who initiated that call?

7 A I believe that Mr. Chazen initiated the phone
8 call at the suggestion of Mr. Zeman.

9 Q Who was present with you at your end of the phone
10 when that call was placed?

11 A Mr. Zeman, Mr. Chazen, I, myself.

12 Q Is it your recollection that this was on a loud-
13 speaker phone?

14 A Yes, sir.

15 Q I would like you to tell us as best you can recall
16 what was said by you and by Mr. Chazen to Mr. Borah in the
17 course of that conversation.

18 A I believe that -- I recall that Mr. Chazen spoke
19 to Mr. Borah. He explained to him, told him that we were
20 in the process of making an examination of the financial
21 statements of a client, that a question had come up regarding
22 transactions involving real estate, that we would like to,
23 at Mr. Zeman's request, we would like to talk to Mr. Borah
24 and get his ideas and his thoughts about this particular
25 transaction.

1 jbp

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2 Bither I or Mr. Chazen, I don't recall, but I
3 believe that perhaps I did, listed the exact details of
4 the transaction --
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Q Tell us what you said to him?

A I told Mr. Borah that our client had acquired property paying approximately \$5,000 down, had contracted in a relatively short time to pay \$25,000 additional and then had to pay an additional million dollars -- I don't recall the exact amount -- an additional million dollars sometime in approximately January 31st.

In addition to that, I indicated that the contract required the acceptance of existing first trustees liens that were on the property as well as the preparation of additional second trustee liens on the property.

That was insofar as we were talking about the properties that had been acquired.

I also explained to him that these properties had been sold, that the contract required \$25,000 down payment, another payment of \$25,000 sometime in January, a payment of approximately, as I recall, three million dollars in cash, I believe, at the end of January, and the assumption of all of the first trustee lien deeds as well as the second deeds that were already presently existing at that time.

Q What else did you tell him?

A Mr. Borah questioned me about, questioned us about details, as I recall. He talked to us about the location of the property, he asked --

Q Tell us what he said about it, the best you can recall?

Did he ask you where the property was?

MR. POLLACK: Objection, your Honor. Leading.

THE COURT: I'll allow it.

MR. CRACO: I am trying to provide the witness' recollection.

THE COURT: I said I'll allow it.

A He asked where the properties were located, whether the contracts had been executed in California, he wanted to know if they had been signed contracts, he wanted to know if we knew anything about the people involved. He wanted to know about the nature of the property, he wanted to know whether the deal appeared to be a reasonable deal.

Q What did he want to know about the nature of the property?

A If it was improved or unimproved property.

Q Go ahead, tell us what else he asked about it?

A He asked whether or not there were CC and Rs that had to be furnished. I am trying to recall. He had, it seemed to me he asked a great number of questions about the property and individually about the nature of the property and the people we were dealing with.

Q Do you recall what responses you gave to those

1
2 questions?

3 A Yes.

4 Q Tell us, as best you recall, what you said in
5 response to those questions?

6 A We told him the contracts had been signed, that they
7 were on documents that appeared to be for California property.
8 We told him that the properties were improved properties.
9 We told him that they consisted of nursing homes. We told
10 him that, trying to recall what else -- it seems to me that
11 whatever questions he asked we responded to based on the
12 information that we had.

13 Q Did you tell him about any liquidated damage pro-
14 visions in the contract of sale by Firestone?

15 MR. POLLACK: Objection.

16 A Yes. I am sorry. That in the contract of sale to
17 the, to sell the properties, there was a provision for
18 liquidated damages.

19 We did tell him that and we made him aware,
20 apprised him of that.

21 Q In the course of this conversation, did you and/or
22 Mr. Chazer have before you Exhibits 21 and 22?

23 A My best recollection is that we did.

24 Q Did you make your description of the terms of the
25 contract by specific reference to the terms of Exhibit 21

and Exhibit 22?

A To my recollection, each and every item was detailed to him.

Q Did you refer physically to the contract in telling him what the contract was?

A My recollection is that I did, sir.

Q And was that true as well in your responses to the questions that he put?

A Yes, sir.

Q And in your opinion as an auditor and as a lawyer, did you give him a full and fair description of the contracts in response to his questions?

MR. HAINOFF: I object to that, your Honor.

THE COURT: Yes.

Sustained.

Q Did you hold anything back that you regarded as significant in the recitation to him of the contractual provisions?

MR. POLLACK: Objection, your Honor.

THE COURT: I think it is a long way to ask.

Did you read the contract to him?

THE WITNESS: My recollection is that we didn't read word by --

THE COURT: Did you read it, yes or no?

1 THE WITNESS: No, sir.

2 THE COURT: All right.

3 Q Did you give him the --

4 THE COURT: Then you gave him selected parts?

5 THE WITNESS: Yes, sir.

6 THE COURT: Parts that you selected?

7 THE WITNESS: Yes, sir.

8 Q And in response to questions did you give him
9 responses, answered questions about matters that he selected?
10

11 MR. HAIMOFF: I don't think that is relevant, your
12 Honor.

13 MR. POLLACK: Objection.

14 THE COURT: I do.

15 A Very candidly gave him complete answers to
16 everything that he asked.

17 MR. HAIMOFF: Move to strike that.

18 THE COURT: No. I'll let it stand.

19 Q What I am getting at, very simply is, did you, to
20 the best of your ability or did you not give to Mr. Borah
21 a complete recital of the transactions as to which you
22 were asking him to review?

23 MR. POLLACK: Objection to the form of the question.

24 A Absolutely.

25 THE COURT: Overruled.

1 A Absolutely.

2 Q Did you have a view at that time as an attorney
3 as to whether those contracts constituted legal valid and en-
4 forcible obligations of the respective parties thereto?
5

6 A In my opinion, they were.

7 Q Did Mr. Borah's opinion confirm that to you?

8 A Yes, sir.

9 Q Just to bring this subject to a close in the light
10 of your Honor's ruling on the hearsay objection, at the
11 time that you issued the Lavenhol opinion which is
12 Exhibit 7 in this case, were you satisfied as the audit partner
13 of Lavenhol that you had developed all the facts and
14 conducted all the audit tests necessary to enable you to
15 render the opinion which you rendered in that exhibit?

16 A Yes, sir.

17 Q Had you, in the course of your investigation,
18 learned of any fact that cast any doubt on the bona fides
19 of the transactions reflected by Exhibit 21 an- 22?

20 A Absolutely none.

21 Q Had all the facts which you did determine and
22 which were reported to you by those who were conducting
23 the audit under your supervision confirm the bona fides
24 and effectiveness of that transactions?

25 A Yes, sir.

Q After you had your conversation --

THE COURT: I want why do you claim it isn't hearsay, what Schwalb told him.

MR. CRACO: Your Honor, I take the position that it is, to borrow a phrase from Mr. Pollack, part of the res gestae. What we are talking about here is what audit steps were taken. I am not offering what Mr. Schwalb told Mr. Lipkin for the purpose of establishing the truth of what Mr. Schwalb told Mr. Lipkin. Simply for the purpose of establishing that Schwalb reported to Lipkin in the ordinary course of the audit as to certain matters that he had discovered and that those then became a matter to which the audit partner addressed himself and --

THE COURT: I think it may be admissible for that purpose.

MR. POLLACK: May I be heard on this point?

THE COURT: I've heard you object to it four thousand times and I've overruled you. It seems to me you cannot charge an accountant with negligence or fraud or bad faith on the ground that he didn't see what he should have seen or on the ground that he didn't make adequate inquiries and foreclose him from saying what he did to inquire.

You can't do it.

MR. POLLACK: They brought Mr. Schwalb in to testify,

I wouldn't object. They didn't and I don't believe his testimony would substantiate these claims.

THE COURT: I think I was in error. I checked the rule and Mr. Craco is correct. My writ only runs 100 miles.

MR. CRACO: I am afraid that is right.

THE COURT: Unless under the Securities Act which my law clerk is checking, it runs farther and it may and my recollection is that it does but that may be in criminal cases only.

But in any event, you could well take his deposition and probably should have and if there is any doubt about it, we can adjourn the trial and permit you to do it, perpetuate the testimony. After all, there is an investment in it and I don't intend to have the case go down the drain for some silly reason like that.

Obviously, no one expected this case to go to trial because in the main we have been preparing it here in the courtroom.

It doesn't matter to me, if you want to adjourn.

MR. CRACO: Your Honor, having come as far as we have, I would just as soon press to a conclusion.

THE COURT: All right. I'll take it for what it is worth. You can brief the point if you want to.

MR. CRACO: And subject to a motion to strike, if your Honor please.

Q Would you tell us -- I am taking you back now, to the point at which Mr. Schwalb is reporting to you, would you tell us what Mr. Schwalb reported to you as a result of -- what he reported to you.

A This is approximately the early part of December?

Q Yes.

Did Mr. Schwalb, first of all, report to you about whether or not he had in fact gone out and examined the books of original entry of the company?

A Yes.

Q What did he report to you about that?

A He was in the course of doing the audit and directing the people and doing the audit.

Q Did he examine the books of original entry of the company, do you know?

A Yes, he did.

Q Tell us what other steps Mr. Schwalb reported to you had been taken.

A He had confirmed accounts receivable, he had confirmed accounts payable, he had confirmed ownership of real estate, he had taken steps to derive proof of ownership of real estate, he had made an effort to --

THE COURT: Are you referring to real estate other than this Monterey transaction?

THE WITNESS: Yes, sir, yes, sir. There was considerable real estate other than that.

Q There was a lot of audit work besides this transaction?

A Right. There was a tremendous amount of other work ranging from verification of cash throughout the job, verification of receivables, verification of payables, notes payable, liens, trusts, real estate holdings, deposits. Every major aspect of the audit was completed.

Q Did he have conversations with Mr. Firestone that he reported to you about the Monterey transaction?

A Yes.

MR. CRACO: I am offering them solely for the

purpose of what Mr. Schwalb told Mr. Lipkin.

Q Would you tell us what Mr. Schwalb told you concerning those conversations?

MR. POLLACK: Objection; hearsay.

THE COURT: You do not need to keep taking that objection. I am taking it subject to a motion to strike and to your right to brief it.

I am convinced you are wrong, Mr. Pollack, but I am not infallible. I am giving you a chance to brief it.

A During the course of the audit he had learned that these -- that the contracts to acquire the property and the agreement of the sale of the property had not yet been recorded on the books of the company. He brought this to my attention with the proposal to prepare an adjusting journal entry after having had a discussion with Mr. Firestone. And I believe he also indicated that he had discussed this with Mr. Scott.

Q Would you tell us what he told you was the substance of those conversations with Mr. Firestone and Mr. Scott on that subject.

A He said he'd been given two contracts, the contract for the acquisition of property, the contract for the sale of the property, and that he was bringing

1 it to my attention as to how to handle this transaction
2 because of the size of the transaction.

3
4 MR. POLLACK: Your Honor, at this time I respect-
5 fully call to the attention of the Court that Mr. Firestone
6 was on the stand and Mr. Craco did not ask him about any
7 conversations with Mr. Schwalb. Mr. Scott was on the
8 stand and Mr. Craco did not ask him about any conversa-
9 tions with Mr. Schwalb.

10 THE COURT: Proceed, Mr. Craco.

11 Q What did Mr. Schwalb tell you about his con-
12 versations with Mr. Firestone?

13 A He told me that Mr. Firestone had given him
14 documents, had told him about a sale, and that basically
15 he then came to me and asked me what should he do in
16 recording the sale.

17 Q Did he tell you whether or not he had discussed
18 with Mr. Firestone the identity of the seller to Firestone?

19 A He had in brief discussed the bona fides of
20 the documentation.

21 Q Did he tell you in substance that he wanted you
22 to pursue the further steps with regard to the establish-
23 ment of the bona fides of the transaction?

24 A I took the initiative and suggested that I do
25 that.

1
2 Q All right.

3 Was there anything else to the discussions that
4 you had with Mr. Schwalb about his conversations with
5 Firestone and with Scott, what you want to tell the Court?
6 If not, we will go on.

7 A I had asked him to look at the documentation,
8 meet with Mr. Scott, who was assembling documentation, and
9 suggest that he do that.

10 Q Did he report back to you that he had?

11 A Yes, he did.

12 Q Did he report back to you with the documentation?

13 A No, he indicated that he had looked at the
14 documentation at the office of the Firestone organization.

15 Q Did he describe to you that documentation?

16 A He said that Mr. Scott was -- yes. I'm sorry.
17 The answer is yes.

18 Q What did he tell you about that?

19 A He said that Mr. Scott was in the process of
20 assembling documentation, that he had showed him -- we're
21 talking about documentation other than these.

22 Q Referring to Exhibits 21 and 22?

23 A Right. That he had showed him first trustees'
24 liens, that he was showing him inquiries that Mr. Scott
25 was making for the purpose of acquiring all the CC&R's

and the various documents that were needed.

Q After your conversations with Mr. Chazen about the accounting treatment of the income, did you have yourself further conversations with Mr. Scott or Mr. Firestone about accounting treatment that Laventhol proposed to accord the Monterey deal?

A Yes.

Q When did you have those conversations?

A I believe some time as far as the 4th or 5th of December; I can't recall.

Q Where did those conversations take place?

A I believe that they were over the telephone.

Q Do you recall whether any of them took place at Firestone's office?

A They might have. I cannot say with certainty.

Q I show you the last page of Exhibit J, which Mr. Chazen has identified as his biweekly time report, and certain expense reports, and draw your attention to the biweekly expense report, and particularly to the item reading "Parking, Firestone Group, \$2," under 12-4-69.

I ask you whether that refreshes your recollection that on December 4th you and Mr. Chazen had a conference at Firestone's office about that subject?

A Yes, it appears that we did.

2 Q All right.

3 Would you tell us what you and Mr. Chazen told
4 Mr. Firestone in your conversations with him about the
5 accounting treatment that you were going to accord the
6 transaction?

7 A We told him that we would pick up only a portion
8 of the income from this particular transaction; that
9 although there was a profit of \$2,030,000, that we were
10 going to pick up considerably less than that.

11 Q Did you tell him how much less than that?

12 A I don't recall whether at that time we talked
13 about it but we talked somewhere in the neighborhood of
14 a quarter of a million dollars or so.

15 Q That was going to be picked up in current
16 income?

17 A For the period ending November 30, 1969.

18 Q Did Firestone or Mr. Scott comment with regard
19 to that presentation?

20 A Mr. Firestone was extremely unhappy.

21 Q What did he say?

22 A He told us that we were incorrect, that the
23 proper treatment would have been to pick up the 2,030,000
24 in the period ending November 30th.

25 Q Did he say why he wanted that treatment accorded

the transaction?

A He said that this would hurt his dealings with Allen & Company, plus the fact that he told us that he thought that that was the proper way to do it, that he felt that based upon his knowledge of real estate, that was the proper reporting approach.

Q Did Mr. Scott participate in these conversations?

A He might have.

Q What is your best recollection?

A My best recollection is that he did, but not to a great degree.

Q Was he present at them?

A My recollection is that he was.

Q All right.

Do you know a man by the name of Scharf,
S-c-h-a-r-f?

A Yes, I do.

Q Who is he?

A Alan Scharf is an investment adviser to Richard Firestone and Martin Scott.

Q Was Mr. Scharf present at any of these conversations?

A My recollection is that he was.

1
2 Q Did he react to the presentation that you and
3 Mr. Chazen made?

4 A He was very unhappy about that and indicated --

5 Q Tell us what he said.

6 A He stated that we were incorrect, that there
7 was a sale, that the entire amount should be picked up.

8 Q At any point during the course of these con-
9 versations did any of these gentlemen threaten Laventhol
10 with suit in the event that the full income was not picked
11 up?

12 A My impression was, and again I say it is an
13 impression, that Mr. Scharf did threaten us with loss of
14 the account as well as the possibility of a lawsuit if the
15 borrowing did not go through.

16 Q As a result of the treatment that you proposed
17 to report the income?

18 A Yes.

19 Q What did you respond in reaction to this re-
20 action on the part of the Firestone Group people?

21 A We were adamant that we could not change it,
22 that this was the maximum that we felt we could in good
23 conscience properly report.

24 Q Did you adhere to that position throughout?

25 A Yes, we did.

MR. CRACO: May I excuse Mr. Chazen?

THE COURT: As far as I am concerned.

Does anybody want him?

(No response.)

Q Do you know how the Lavenhol report on the financial statements of the Firestone Group, the audited report, got to New York?

A My best recollection is that the statements were delivered to Mr. Firestone at his office in Beverly Hills.

Q And that he took the statements to New York?

A That is my understanding.

MR. POLLACK: Objection to his understanding, your Honor.

THE COURT: Overruled.

One of your causes of action here, Mr. Pollack, which you seem not to be aware of, is common law fraud, which turns, among other things, on scienter, which turns,, among other things, on a man's state of mind.

Now, let us proceed. I am getting weary of that objection.

Q I direct your attention to Exhibit 7 and I ask you when this report left your office whether the page of Exhibit 7 called Schedule of Deferred Income was in the

report?

A No, sir.

Q Did there come a time when you had a telephone conversation with Mr. Lee Meyer?

A Yes, sir.

Q By the way, how many times total had you talked with Mr. Meyer?

A Well, I've known Mr. Meyer since some time in February 1969 when he had been a director of the Firestone Group and worked on these various registrations, and so that I cannot say, but probably a half a dozen, maybe a dozen times.

Q You know Mr. Meyer and you knew him by mid-December of 1969?

A Yes, sir.

Q Did there come a time in December of 1969 when you were a party to a telephone conversation in which Mr. Meyer was also a party?

A Yes.

Q Was anybody with you at the time of that conversation?

A Mr. Chazen and I believe Mr. Schwalb was there, also.

Q Was the telephone call received in the first

instance by you?

A Yes, sir.

Q Was it placed by you or did the call come in to you?

A It was an incoming call.

Q When you picked up the phone, who was on the other end?

A Mr. Firestone.

Q Was he then joined on the phone by other persons?

A By Mr. Scharf, and at that time he indicated he was with Lee Meyer. I don't believe that Lee Meyer said anything to me at that time.

Q All right.

What was said to you and what did you say in the course of the conversation at that point?

A Mr. Firestone renewed his request that we change the financial statements to reflect \$2,030,000 as income from the sale of the properties to Ruderian.

Q Can you tell us on approximately what date this conversation took place, to the best of your recollection?

A Some time around December 10th or 11th.

Q Is it your testimony that Mr. Firestone placed the call to you from the other end in New York?

1
2 A That is my understanding.

3 Q Do you know whether he had with him at that
4 time the financial statements, a copy of which is Exhibit 7?

5 A They referred to the statement.

6 Q *n the course of this conversation?

7 A Yes, sir.

8 Q All right.

9 What did you respond to Mr. Firestone when he
10 made that request?

11 A I suggested that we really have Mr. Chazen join
12 us on the telephone conversation since Mr. Chazen had
13 taken part in so much of the decision-making process.
14 Plus the fact that Mr. Firestone knew Mr. Chazen, and I
15 thought that would be better, to have two rather than one.

16 Q Did that telephone conversation ensue with the
17 persons whom you have identified as all being present
18 on the Los Angeles end?

19 A Yes, we had the call transferred to Mr. Chazen's
20 office.

21 Q Again, for the sake of brevity, were you in
22 court today when Mr. Chazen testified to the substance of
23 that telephone conversation, both on direct examination
24 by me and on cross-examination by Mr. Pollack?

25 A Yes, I was.

Q Is your recollection of the telephone conversation substantially the same as Mr. Chazen?

A Yes, indeed.

Q In particular, do you recall whether or not Mr. Meyer attempted to convince you and Mr. Chazen to change the accounting treatment which was accorded the transaction in the financials?

A Mr. Meyer was very positive in his approach that we should pick up the entire amount and change the financial figures.

Q Did he say why?

A He told us that it was proper accounting to reflect the whole thing.

Q Did he say why it was proper accounting to do that?

A He indicated that it was a completed transaction, there was a sale, and he felt that the proper way to report sales was to report all the income from the sales.

Q And Mr. Meyer told you that in that conversation, is that correct?

A Yes, sir.

Q Finally, really finally, Mr. Lipkin, let me ask you this:

Were you in this court the other day when Mr.

1 Meyer testified that he had a person-to-person conversation
2 with you in the law offices of the person you are referring
3 to here in New York on December 15, 1969? Did you hear
4 that testimony?

5 A Yes, I was.

6 Q Did you have a person-to-person conversation
7 with Mr. Meyer in the offices of the Persinger law firm or
8 anywhere else in New York on or about December 15, 1969?
9

10 A Absolutely not.

11 Q Did Laventhol have any representative at the
12 closing of the private placement?

13 A No, sir.

14 Q Did you come to New York in connection with the
15 closing of the private placement?

16 A Absolutely not.

17 Q Would you tell the Court how you can be so
18 sure that you did not have that person-to-person conversa-
19 tion with Mr. Meyer, that he sat there and told us about,
20 on or about the 15th of December 1969?

21 A I believe that my time sheet indicates that I
22 was not in New York at that time, plus the fact that I
23 have not been in New York in 35 years until I came subse-
24 quently to another matter.

25 Q What matter was it that you came to?

1
2 A I came to a hearing with the Attorney General
3 of New York State.

4 Q In connection with this transaction?

5 A Yes, sir.

6 MR. POLLACK: Objection, your Honor.

7 MR. CRACO: I am only trying to fix the time,
8 your Honor. If he had not been in New York for 35 years
9 until a hearing by the Attorney General on this trans-
10 action, he obviously could not have been talking with
11 Mr. Meyer on December 15, the day before his closing.

12 THE COURT: I will allow it.

13 Q Was the Attorney General's hearing in connection
14 with this transaction?

15 A Yes, sir.

16 Q Just to allay any problems of Mr. Pollack, did
17 the Attorney General take any action with respect to that
18 transaction, if you know?

19 A Absolutely not.

20 MR. CRACO: Your witness.

21 CROSS EXAMINATION

22 BY MR. POLLACK:

23 Q Did you have a telephone conversation, while you
24 were in Los Angeles and Mr. Meyer was in New York, with
25 Mr. Meyer on the 15th of December?

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1 A To the best of my recollection, no.

2 Q Would you swear to it?

3 MR. CRACO: Oh, your Honor, he is swearing
4 to everything here.

5 THE COURT: I supposed he was.

6 MR. CRACO: I object to the form of the ques-
7 tion.

8 Q Where did Mr. Chazen and you have a telephone
9 conversation with Mr. Ruderian?

10 A Mr. Chazen did not have a telephone conversation
11 with Mr. Ruderian.

12 C Excuse me, Mr. Boyer, I mean.

13 A In Mr. Boyer's office.

14 Q You were in Los Angeles on the telephone?

15 A Yes, sir.

16 Q Where was Mr. Ruderian?

17 A We placed the call in -- to Mr. Ruderian's
18 office in Los Angeles.

19 Q So Mr. Ruderian's office was in Los Angeles?

20 A Yes, sir. To the best of my knowledge, it
21 was.

22 Q What was the date of that conversation?

23 A I believe some time around the 3rd or 4th.
24 I don't recall. Some time early in December.

Q Did you make a written memorandum of the conversation?

A I do not recall that I did.

Q Is there any record whatsoever in the Laventhol work sheets of that conversation that you say you had with Mr. Ruderian?

A Well, I notified Mr. Schwalb that I had made that notation -- that we had made the call, I'm sorry, sir.

MR. POLLACK: May I have that answered, please, your Honor?

THE COURT: Yes, reread the question.

(Question read.)

A I believe there is none now, but there might have been at the time that we had the meeting with the Attorney General, sir.

MR. POLLACK: Your Honor, may I have an answer to the question, please?

MR. CRACO: I think that is a responsive answer, your Honor.

THE COURT: I think so.

Q Was Mr. Schwalb in any way a participant in your conversation or your alleged conversation?

THE COURT: When did you last see the records?

1 THE WITNESS: I'm sorry, sir?

2 THE COURT: When did you last see these so-
3 called missing records?
4

5 THE WITNESS: At the time that we were in New
6 York City some time, I believe, in late '71, maybe early
7 '72.

8 THE COURT: What records were they?

9 THE WITNESS: All the records were subpoenaed
10 in connection with an examination by the Attorney General
11 of New York in connection with the Firestone matter.

12 THE COURT: All of the records in connection --

13 THE WITNESS: Every record.

14 THE COURT: Did you make duplicates of them before
15 you turned them over to the Attorney General?

16 THE WITNESS: No, sir. We took the records
17 there and the Attorney General asked if he could have
18 them. He had investigators that he wanted to have go
19 through all the records.

20 THE COURT: Did you take an inventory of them
21 before you turned them over?

22 THE WITNESS: There were substantial records,
23 sir.

24 THE COURT: Did you take an inventory?

25 THE WITNESS: No, sir. I'm sorry.

THE COURT: You mean you turned records over to the Attorney General without knowing what you turned over and without making sure that you got them all back? Is that what I am to believe?

THE WITNESS: He spoke to my attorney and --

THE COURT: Is that what happened?

THE WITNESS: Yes, sir.

MR. CRACO: I might say in self-protection at this point, your Honor, that we did not represent Mr. Laventhol in connection with that investigation.

THE COURT: I am sure you did not.

Q Did you ask for written written confirmation --

THE COURT: I would certify it.

Did anybody?

MR. CRACO: Yes, your Honor. A law firm in New York did.

MR. POLLACK: Strike the beginning of my question. I would like to put a new question.

MR. CRACO: Excuse me, Mr. Pollack.

I just might say for the record, in fairness, that we have made efforts to obtain those records from the Attorney General, and from our brethren at the bar, and I am not in a position to represent whether there are any other records. I think we have everything that counsel

1 had, but I am frank to say that I have reason to suspect
2 that there may have been records that went astray at the
3 Attorney General's office that we have no way of identi-
4 fying, and I cannot rely upon it.

5
6 Q Did you receive written confirmation from
7 Rudarian of the obligation of Continental Recreation Company
8 to Firestore?

9 A No, I did not, sir.

10 Q Did you ask for it?

11 A No, sir.

4 12 Q By "you," I mean in this question not just you
13 personally, but anyone at Laventhol?

14 A The only two people I know who spoke to Mr.
15 Rudarian were Mr. Boyer and myself, and neither of us at
16 that time asked for written confirmation.

17 Q How long have you been a practicing accountant?

18 A Approximately 18 years.

19 Q Have you engaged in any other profession during
20 that period of time?

21 A Within the past 18 years?

22 Q Yes.

23 A No, sir, except -- okay. Except for one year
24 as an attorney.

25 Q What year did you spend as an attorney?

1 A In 1955. I acted concurrently as both an
2 attorney and a CPA.
3

4 Q For one year?

5 A Yes, sir.

6 Q Is that the totality of your legal practice?

7 A Yes, sir.

8 Q Where?

9 A In Chicago.

10 Q Are you a member of the bar of California?

11 A No, sir.

12 Q Are you a member of the bar of Ohio?

13 A No, sir.

14 Q Did you note in your examination of the contract
15 between Firestone and Continental that the signatures were
16 not notarized?

17 A I did not note it, no, sir.

18 Q Did you note in your examination of the contract
19 between Firestone and Continental that the corporate seal
20 of neither of the two corporations was affixed?

21 A Yes, sir, I knew that.

22 Q Is Lee Meyer an accountant?

23 A I do not know.

24 Q Did he ever tell you he was an accountant?

25 A No, sir.

Q Did you or anyone else at Laventhol rely on Meyer in terms of your decision as to how to treat the transaction with Continental Recreation in the report and financial statements?

A No, sir.

Q Do you know the name Robert Feinberg?

A I believe he's an attorney in New York City, sir.

Q What is the capacity in which you came to know him?

MR. CRACO: I think the testimony is, your Honor, that he knows the name, not that he knows the person.

MR. POLLACK: May I have an answer, please, your Honor?

THE COURT: Yes.

Could you answer the question?

A I met Mr. Feinberg some time early in March or April '69 -- I believe is the time that Firestone first talked about a registration.

Q Was Mr. Feinberg an attorney for the Firestone Group, Limited?

A He was an attorney for the Firestone group, Limited.

MR. POLLACK: May I have the last question and answer reread, please?

(Question and answer read.)

Q Was Mr. Feinberg a partner of the law firm of Jacobs, Persinger & Parker, to your knowledge?

A I do not know, sir. I do not recall.

Q Did you have a conversation with Mr. Feinberg on December 15th about the report and financial statements of Laventhol for the Firestone Group, Limited, for the period ending November 30, 1969, and dated December 6, 1969?

A I really don't recall having a conversation on that date with him.

Q Do you deny participating in a telephone conversation with Mr. Feinberg on that date?

MR. CRACO: I object to the form of the question, your Honor.

MR. POLLACK: Your Honor, I think this is an important piece of evidence.

THE COURT: I have never known that to be a rule for admission, that it is important.

Have you, Mr. Pollack?

MR. POLLACK: No, sir.

THE COURT: Objection sustained.

1
2 Q Is it possible that you participated in a
3 telephone conversation with Mr. Robert Feinberg?

4 THE COURT: Sustained.

5 Did you have a telephone conversation with Mr.
6 Robert Feinberg on the date counsel asked?

7 THE WITNESS: Not to the best of my recollection,
8 sir.

9 THE COURT: Next question.

10 Q Did you make any memorandum of the telephone
11 conversation that you say you had on December 11th and in
12 which Lee Meyer was a participant?

13 A No, sir.

14 Q Is there any reference in the work papers of
15 Laventhol of any such conversation?

16 MR. CRACO: Your Honor, I object to that.
17 The work papers relate --

18 THE COURT: So far as he knows.

19 MR. CRACO: All right.

20 A So far as I know, no. No, sir.

21 Q How do you know or on what basis did you
22 testify, when asked by Mr. Craco, that Mr. Firestone
23 delivered the financial statements to New York.

24 A Mr. Scharf and Mr. Firestone indicated that
25 they had the statement.

Secondly, I had talked to them just before they were leaving, and they told me they were going to New York in connection with the closing.

Q When?

A I believe some time towards the end of that week, about the 11th or 12th.

Q Mr. Schwalb was the manager of the audit for Laventhol?

A Yes, sir.

Q Did Schwalb tell you that Laventhol should not recognize the sale of Continental because the deposit was too small?

A I do not recall that Mr. Schwalb ever said that, sir.

Q I show you Exhibit A-12 and I read from item 3. A-12 is a document that has previously been identified as an adjusting entry.

"Income taxes payable. Deferred income taxes. Reverse entry for tax liability for sale to Continental Recreation as LKH&H will not record as sale since not enough deposit was given Firestone."

Does that refresh your recollection --

A May I see that, sir?

Q Does that refresh your recollection that Schwalb

2 told you that this transaction should not be recognized
3 as a sale since not enough deposit was given to Firestone?

4 A If you look at this, sir, you will see that
5 what they are talking about --

6 THE COURT: Please.

7 MR. CRACO: Does it refresh your recollection
8 in that respect?

9 THE COURT: Listen to the question.

10 THE WITNESS: I'm scrry, sir.

11 A Yes, it does.

12 THE COURT: Does it refresh your recollection
13 that Schwalb told you that this transaction was not to be
14 recognized as a sale because the down payment was too
15 small?

16 THE WITNESS: Which does not refresh my
17 recollection for that purpose.

18 MR. CRACO: May I see A-12, please, Mr. Pollack?

19 Q Did Schwalb raise with you the question as to
20 whether or not the deposit was too small to treat this
21 transaction as a sale?

22 A No, sir, Schwalb sat down and asked Mr. Chazen
23 and me to decide that along with him. The basic
24 decision was ours.

25 MR. POLLACK: Your Honor, at this time I would

like to read into the record briefly several portions of the deposition of Mr. --

THE COURT: We are going to adjourn now.

MR. POLLACK: Your Honor, with that I am finished.

THE COURT: Well, you will finish at the adjourned time, which will be 5 o'clock Monday afternoon in Courtroom 501. This trial should have finished three days ago.

MR. CRACO: Your Honor, excuse me. I hesitate to raise this, but Mr. Lipkin has other obligations. He has been in court for a number of days.

THE COURT: Put whatever questions you have to Mr. Lipkin.

MR. CRACO: I really would like to excuse him.

THE COURT: I have other obligations as well. This is not my total life, this case.

MR. CRACO: I understand.

THE COURT: I will put up with five more minutes of it today and that is all. I have other engagements.

MR. POLLACK: I have no further questions of Mr. Lipkin.

THE COURT: You are excused.

MR. CRACO: May we find out if Mr. Haimoff has any questions, and we will let the witness go.

MR. HAIMOFF: I would like to offer in evidence a work paper, if your Honor pleases --

THE COURT: Do you have any questions of this witness?

MR. HAIMOFF: No.

THE COURT: You are excused.

(Witness excused.)

THE COURT: 5 o'clock, Room 501, Monday.
Good night.

(An adjournment was taken to October 29, 1973,
at 5.00 o'clock p.m.)

WITNESS INDEX

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<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Robert Scott Japson, Jr.	542	546		
Richard Firestone (Resume?)	548	557	563	564
Eli Boyer	565	579		
Charles Chazen	584	620		
Arnold L. Lipkin (Recalled)	654	696		

EXHIBIT INDEX

Defendant

Identification In Evidence

J

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Plaintiffs

A-27

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vs

71 Civ. 2209

The Firestone Group, Ltd. et al.

New York, New York
October 29, 1973 - 5:00 p.m.

(Trial resumed.)

MR. CRACO: Good afternoon, your Honor. I take it from the hour of the day and the remarks at the foot of the last case, that we shall be brief.

THE COURT: Mercifully brief, I hope.

MR. CRACO: First of all, your Honor, I should like to rest. Having rested I should like to move to discontinue the third party action ad against Martin Scott, because in his absence, it seems only fair that we as third party plaintiffs recognize that we have not made out a prima facie case in the third party action against him, and so I move voluntarily to discontinue as to him.

THE COURT: Motion granted.

MR. CRACO: Next, I move pursuant to Rule 15B, to amend our plea to the third party counterclaims to assert the following additional defenses to conform to the proof:

First that Allen & Company and Allen & Company, Incorporated lack standing to sue for the violations complained

of in that they were not purchasers or sellers in the transaction in connection with which the allegedly misleading financial statement was issued.

Next, that Allen & Company and Allen & Company, Incorporated lack standing to sue for violations they complain of in that the assignments of the claims in which they purport to sue are void as against public policy.

Third, pursuant to the laws of New York in effect at the time thereof, the written instruments of release given by their respective alleged assignors to Allen & Company and Allen & Company, Incorporated effectively released Laventhol, Krekstein, Horwath & Horwath with respect to any liability for the transactions complained of in the counterclaims.

Fourth, that Allen & Company and Allen & Company, Incorporated have waived any claims they might have had against Laventhol, Krekstein, Horwath and Horwath by virtue of the following conduct of their officers and employees among other things.

One, Lee Meyer was a director of Firestone at all pertinent times. Two, Allen & Company and Allen & Company, Incorporated unlawfully solicited purchasers of the units in connection with the private placement thereof by exaggerated sales claims and touting.

Three, for the purpose of increasing the apparent

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net earnings and the sales appealability of the units they, in concert with others, attempted to induce Laventhol, Krekstein, Horwath & Horwath to reflect as current income all the profit from the Monterey transaction, the recognition of a part of which they now allege to have been misleading.

Four, they and others acting in concert with them, disseminated to purchasers of the units correspondence executed by the issuer the purpose and effect of which was to minimize the impact on investors of the audited financial statements certified by Laventhol, Krekstein, Horwath & Horwath, which audited statements reflected a materially less favorable financial picture of Firestone than the projections contained in the note and stock purchase agreement previously circulated by them.

Finally, as to the fourth and fifth counterclaims which I may remind your Honor sound in common law tort, and sound like they sound in negotiation, as to those two, Allen & Company and Allen & Company, Incorporated by virtue of all of the conduct above describes oral negotiations and assumed such risks as the acquisition of the units from their respective investors may have involved.

Finally, your Honor, and then I will subside for the moment, I renew all motions to strike on the plaintiff's and the third party plaintiff's case in particular I would

like to add to the prior motions to strike a motion to strike all testimony concerning alleged oral assignments on the ground that such testimony attempts by parol evidence to vary the terms of the written instruments of assignment in Exhibit A-22, and the releases that were tendered by the respective investors to Allen & Company and Allen & Company, Incorporated.

That is all I have to say at this juncture, your Honor.

THE COURT: Mr. Pollack.

MR. POLLACK: Your Honor, I oppose the motion to amend the pleadings on the grounds that the proposed amendment does not conform to the proof that has been developed at trial, and secondly, that such amendment could have been made at the outset of the trial or at any other time, and was not timely made.

THE COURT: I think the motion is timely. Everyone has had to amend his proof in this case, including you, so we will grant the motion to amend the pleadings to conform to the proof.

MR. POLLACK: At this time, your Honor, I have.

THE COURT: As to the other motions I will reserve decision.

MR. POLLACK: At this time, your Honor, I have

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2 certain motions but I think in the interests of time I
3 would like to put on our brief rebuttal case and then make
4 the motions.

5 THE COURT: All right.

6 MR. POLLACK: I call to the stand Mr. Robert
7 Feinberg.

8 R O B E R T F E I N B E R G, called as a witness
9 by third party plaintiff, being first duly sworn,
10 testified as follows:

11 DIRECT EXAMINATION

12 BY MR. POLLACK:

13 Q Mr. Feinberg, are you an attorney and a member of
14 the law firm of Jacobs, Persinger & Parker?

15 A Yes, I am.

16 Q How long have you been admitted to practice law
17 in the State of New York?

18 A 17 years.

19 Q Are you a member of the Bar of this court?

20 A Yes, I am.

21 Q Was your firm counsel to the Firestone Group, Ltd.
22 in connection with the private placement of December 16,
23 1969?

24 A Yes, we were.
25

Q Were you the partner in charge of the matter?

A Yes, I was.

Q Did you work on the matter on the date December 15, 1969?

A Yes, I did.

Q Please relate to the Court the event of December 15, 1969?

A On December 15, 1969 I arrived at my office late in the morning, having had a previous appointment uptown, and found Richard Firestone, a man named Scharff, and Martin Scott, in my office, in a conference room in our offices. In a meeting with one of my associates, Irving Needleman, who is presently a partner, a member of our firm.

Mr. Firestone, Mr. Scott and Mr. Scharff had an appointment to be in our offices that day to prepare for the closing of the placement which to the best of my recollection was scheduled for the 16th of December.

When I arrived they were, as I said, in the conference room, and when I entered the conference room to join the meeting, apparently there was an indication that there was a problem present.

I asked what the problem was and what the trouble seemed to be, and Mr. Needleman advised me that the certified

1 financial statements which Mr. Firestone had brought with him
2 did not appear to meet the requirements of the financial
3 statements set forth in the private placement memorandum
4 and agreement with Allen & Company.
5

6 I then examined the financial statements, read
7 them carefully, compared them with the offering circular or
8 private placement memorandum, and advised Mr. Firestone that
9 I thought we had a real problem in completing the placement
10 and suggested that we get or call Lee Meyer from Allen &
11 Company to come over immediately to discuss the problem.
12

13 I called Mr. Meyer. My recollection is that he
14 arrived very shortly; that we sat down in a room in this
15 conference room in which Mr. Scharff, Mr. Scott and Mr.
16 Firestone, Mr. Meyer and myself were present; and began to
17 discuss what appeared to be a problem and to attempt to
18 ascertain what the next course of conduct was going to be.
19

20 Mr. Meyer appeared to me to be very, very upset
21 and shaken by the financial -- by the results reflected in
22 the -- or shown in the financial statements.
23

24 Attempts were made by Mr. Meyer and myself to
25 get some further explanation concerning the certified
financial statements from the Firestone people who were
present; principally Dick Firestone and Mr. Scharff, and it

2 was finally determined or suggested by someone, and I don't
3 recall by whom, that we place a call to the auditors in Los
4 Angeles at Lavenhol, Krekstein, Horwath & Horwath, and
5 someone in the room, and I don't recall who it was, placed
6 a call to Mr. Lipkin, and that call was connected on a
7 loudspeaker phone, and we proceeded to have a conversation
8 at least for a good part of the time on the speaker phone with
9 Mr. Lipkin who, to the best of my recollection, again, when
10 the call was initiated, asked if we would hold on for a minute
11 or would because he wanted to bring one of his partners
12 into the room with him, and I do not recall that gentleman's
13 name.

14 The questions, as I recall them, that concerned us
15 in the financial statements were several fold.

16 First, there was -- it was clear that the operating
17 results for the audited period did not conform with the
18 projections that had previously been prepared by Firestone
19 Group; and secondly, the balance sheet did not to the best
20 of my recollection meet the net worth and other tests that
21 had been set forth in the projections.

22 It was my judgment that there was a sufficient
23 discrepancy between the projections and the financial statements
24 that the company could not offer the securities on the basis
25 of the offering circular without -- or private placement

memo, without further advice or notification to the subscribers.

We were further troubled, I think, or at least had some questions, if not troubled we had questions with respect to the treatment of a particular transaction which seemed to have created a substantial amount of income and I cannot recall the specifics of it, but I do recall in general that it was a purported purchase and resale of land in California resulting in a production of some income for income statement purposes.

I recall having some basic questions about the transaction because I was not familiar with it, and didn't really know any of the details.

The question I was particularly interested in was whether or not this was a bona fide transaction, and I asked the Laventhol, Krekstein people whether they had in fact seen the documents and gotten an opinion of a California attorney that this was an enforceable transaction on both sides. I was told that they had gotten such an opinion.

I believe that the questions with respect to the accounting treatment were propounded by Lee Meyer, and those questions were basically asking whether the treatment afforded to the transaction were proper under generally accepted

accounting principles.

Q You say Meyer was asking Laventhol this question?

A Yes; to the best of my recollection, and I may have interjected some questions of my own. There was an open phone and I think we were -- as the conversation progressed it raised other questions, and I think the most of the conversation with the other side went on between Lee Meyer on behalf of the underwriter, myself, as counsel for the company, and I think Mr. Scharff was participating in effect on behalf of management of Firestone Group; although was not part of management he was an advisor or an independent consultant.

The question basically was -- the questions were basically, one, is this a bona fide transaction? I have addressed myself to that.

Two, is the accounting treatment correct? Should any income be booked during this period at all?

Should it be booked as handled by Laventhol, or should the entire profit, whatever that was supposed to be, be booked at this time?

And my recollection is that the gentleman from Laventhol told us that accepted accounting principles required that the transaction be reported as it was reported and that the other two alternatives would not be proper accounting treatment.

Following that discussion Mr. Meyer and I and the other gentlemen sat down and started to prepare a summary of the discrepancies or items of difference between what had happened and what was supposed to have happened as reflected in the offering memorandum, and Mr. Meyer, as I recall it at that time left to go back to Allen & Company saying that he had to have a meeting with the Allens, I think, was the expression he used.

During that period of time, I was on the phone with Jim Deer, James Deer who is a partner of the firm of Holtzman, Wise & Shephard who was counsel to the underwriters, and we were discussing whether the offering could proceed at all and if it could, how could the thing be handled to allow it to close or close subject to other materials being obtained or concepts being obtained.

Q In that telephone conversation with Laventhol, did Mr. Meyer tell Laventhol how to treat this transaction for accounting purposes?

A Not to the best of my recollection. His questions were -- what he asked were questions as to whether the accounting treatment was correct, and whether it was the only correct accounting treatment, but I have no recollection of anyone in the room attempting to tell Laventhol what to do.

Q Indeed was the reverse the case?

MR. CRACO: I object to the form of the question.

THE COURT: Sustained.

Q Did Lipkin insist that the way Laventhol was handling the transaction was the only proper way to handle the transaction?

A My recollection is that -- or at least it appeared to me that the questions with respect to the specific account were being fielded by Lipkin but the questions of accounting policy and practice were being fielded more by the other gentleman who was present; and I am not sure it was Lipkin who was responsible for the definitive statement but one of them was.

My recollection is that it was the other gentleman whose name I do not recall, but who was introduced on the telephone as a partner of the firm.

It was his position as I recall it, that the accounting treatment afforded the transaction in the financial statements was the only acceptable accounting treatment in the transaction.

Q When for the first time did you ever see the report and financial statements of Laventhol?

A The morning of December 15th, when I arrived at my office.

Q Did you have several conversations that preceding week with Lee Meyer regarding the private placement?

A Yes, I did. I had telephone conversations or meetings with Lee Meyer on virtually every day of the preceding week.

Q Did the question of the Laventhol report and financial statements arise in those conversations?

A Almost daily, if not daily.

Q In what connection?

A In context of the fact that we had seen virtually everything that we had to have seen or had in hand in order to effectuate the closing except the financial statements, and there was an expression of concern on my part as to whether we were going to get the financial statements, and if we got them, whether they were going to be -- to reflect the financial status and results that the private placement memorandum required.

Q Did Mr. Meyer tell you in those conversations that he had not seen or received the financial statements and report of Laventhol?

A He assured me that he was equally concerned and had not received or had not seen the financial statements.

Q To your knowledge, was the first time that Lee Meyer ever saw the report and financial statements of

Laventhol at the conference in your office on December 15, 1969?

A To the best of my knowledge, the first time he saw them was when I handed it to him.

MR. POLLACK: No further questions.

MR. CRACO: A few very brief ones, your Honor.

CROSS EXAMINATION

BY MR. CRACO:

Q Would it refresh your recollection if I asked you whether the partner who was on the other end with Mr. Lipkin was a Mr. Chazen?

A The name is familiar, and I recall speaking with a Mr. Chazen on Firestone matters from time to time but whether he was the man with whom I spoke that day I could not say.

Q When you entered the conference room that day and studied the audited financials, did you conclude that they did or that they did not confirm the financial picture which was reflected by the projected financial statements in the note and stock purchase agreement?

A They did not confirm the projections.

Q Were they, the audited financial statements, reflective of a more or less favorable financial position on the part of Firestone?

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A I think that's difficult to evaluate. I think I would say they did not conform, which gave us a problem, and I really don't think that the question can be answered in the manner in which it was phrased.

Q Was the problem that they posed for you in going forward with the deal that they showed that Firestone was in a better financial situation than the projected statement?

A They -- the thing that I recall principally was that they showed substantially less earnings than what had been projected for the period.

Q After your conversation on the telephone that you described, and your other conversations of that day, was any change made to the income statement as audited by Laventhol, Krekstein, to your knowledge?

A Not to the best of my knowledge, no.

Q So they went out the way that you saw them?

A Yes.

MR. CRACO: That's all.

MR. HAIMOFF: I have nothing, your Honor.

THE COURT: Any redirect?

MR. POLLACK: No, your Honor.

THE COURT: You are excused, Mr. Feinberg.

MR. POLLACK: I call back to the stand Mr.

Lee Meyer.

THE CLERK: You are still under oath, Mr. Meyer.

L E E W. M E Y E R, having been previously
duly sworn, was recalled and testified further
as follows:

DIRECT EXAMINATION

BY MR. POLLOCK:

Q Mr. Meyer, did you ever tell Mr. Laverthol how to
treat the Continental Recreation transaction for accounting
purposes?

A No, I asked a lot of questions about it, but I never
told them. They were the auditors and it was their statement.

Q Did you hear the testimony of Robert Feinberg
this afternoon regarding the telephone conversation of
December 15th?

A Yes, I did.

Q Is his account of the conversation accurate?

A Yes, it sounded accurate to me.

Q You testified the last time that Mr. Lipkin was
physically present in the conversations on December 15th.

Does the testimony of Mr. Feinberg refresh your
recollection on that point?

A Yes, it does.

Q In what respect?

2 A There were three people in from California, the
3 third party was Scharff. I had previously thought that it
4 was Lipkin. He took such -- his voice took such a prominent
5 part in the conversation, it was an intimate part of the
6 meeting, but he was on the other end of the telephone. Scharff
7 was in from California.

8 Q Did you ever see the Laventhol report and the
9 financial statements at any time prior to coming to the office
10 of Mr. Feldberg on December 15th?

11 A No.

12 Q Mr. Firestone testified after you did that he told
13 you that he wanted to take the entire profit on the
14 Continental transaction into current income, and he further
15 testified that you agreed with his position.

16 Q Did you take a position on that issue with Mr.
17 Firestone?

18 A I told him that was -- that if he could get the
19 Laventhol people to concur in the treatment, it would be fine
20 with me, but that Laventhol were the people preparing the
21 audit and they had to sign, and whatever they said was going
22 to, in the last analysis, be determinative of what the
23 financial statements contained.

24 Q Finally, Mr. Mayer, did you see any documentation
25 whatsoever on the Continental transaction transaction at any

time prior to the closing of the private placement?

A No, I did not, nor subsequent.

MR. POLLACK: I have no further questions.

MR. GRACO: No questions, your Honor.

THE COURT: Mr. Haimoff?

MR. HAIMOFF: No questions.

THE COURT: You are excused, Mr. Meyer.

MR. POLLACK: Your Honor, at this time I have a few brief excerpts to read into the record.

At page 31, line 8 of the deposition conducted by Mr. Lewis, the deposition of Mr. Lipkin.

"Q Did you ever instruct any members of your staff or other partners of Laventhol to contact attorneys to determine the validity of the sale or purported sale of the Monterey Inns convalescent homes to Firestone?

"A Yes.

"Q Whom did you contact?"

(An interruption.)

"Q Whom did you instruct?

"A Mr. Schwalb.

"Q Did Mr. Schwalb contact his attorney?

"A I believe yes.

"Q Do you know which attorneys he contacted?

"A I do not.

"Q Did he report to you as to which attorneys he had contacted?

"A Yes.

"Q You don't recall which ones they were?

"A I recall that he and I contacted an attorney whose name I don't recall at the moment.

"Q Was his name Mr. Nutter?

"A I just don't recall the name.

"Q When did you instruct Mr. Schwalb to contact this attorney?

"A Sometime before the end of the audit.

"Q Did you instruct any members of your staff or other partners to contact an attorney in connection with the sale of the Monterey Convalescent homes by Firestone or Continental Recreation?

"A I don't recollect at the moment."

At page 116, line 5, in the deposition of Mr. Lipkin conducted by Mr. Haimoff.

"Q Did you make a further investigation into Continental Recreation to determine what its net worth was?

"A Yes.

"Q What further investigation?

"A Contacted Mr. Ruderian.

"Q And what did Mr. Ruderian say?

"A I had Mr. Eli Boyer who was one of my partners, who is personally acquainted with Mr. Ruderian contact him specifically in connection with this particular contract. The purpose of this was to ascertain, number one, that Mr. Ruderian intended to go through with the deal, what Mr. Ruderian intended to do with the property, whether these terms as indicated in this agreement were the terms that Mr.

Ruderian intended, whether this is a bona fide contract, what Mr. Ruderian's status was, vis a vis the contract and in general to determine to what extent we could rely upon the fact that this was a bona fide transaction.

"Q Now you said you had Mr. --

"A Eli Boyer.

"Q -- contact Mr. Ruderian on all those points?

"A Right.

"Q You did not do this personally?

"A I was in the room when he contacted him"...

Moving to page 118 at line 16.

"Q You were in the room?

"A I was in the room. It was on a speaker phone.

Mr. Ruderian told Mr. Boyer all this. He told him he intended to go through with this, that he thought it was a good deal and that he had a group of people in Hawaii from whom he had raised considerable other sums of money whom he intended or already had contacted in connection with this matter and was very anxious to go ahead with this matter and he indicated that this was a desirable deal from the standpoint of the people to whom he normally went for investors.

"He basically told Mr. Boyer his basic operation was with small groups of very wealthy investors and he and Eli were on a first name basis and he rounded to me that he

was certainly very candid with the answers to the questions. We told him why we were asking questions, that this was a large transaction and we were interested just to be sure that this was a legitimate transaction.

"Q Did you get the impression from this conversation that you had via Mr. Boyer's conversation with Mr. Ruderian, that he expected to raise the money necessary from other investors? You mentioned some people in Hawaii.

"A From people whom he normally worked with. He indicated that he worked with small groups of investors and that he had people in Hawaii who were interested in going in with him in this deal.

"Q Now you knew nothing about these people in Hawaii?

"A No."

Parenthetically I call to the attention of the Court the testimony of the Mr. Boyer in which he flatly denied any such discussion about Hawaii and investors in the conversation with Mr. Ruderian.

In the deposition of Mr. Lipkin conducted by Mr. Lewis at page 51 line 15.

"Q Did you have any conversations on the treatment of that particular item -- referring to Continental with Mr. Leo Moyer?

"A Yes.

"Q When?

"A There was a telephone call.

"MR. CRACO: The question was when, Mr. Lipkin.

"A Sometime after December 6, 1969.

"Q After December 6th?

"A Yes."

Going down to line 18.

"Q Were there any other parties to the telephone call as you recall?

"A Yes.

"MR. CRACO: Would you identify them.

"THE WITNESS: Mr. Allen Scharff.

"MR. CRACO: Spell it.

"THE WITNESS: S-c-h-a-r-f.

"Mr. Richard Firestone, Mr. Martin Scott and Lee Meyer.

"MR. CRACO: Were they all on the other end of the phone from you?

"THE WITNESS: Yes."

Going down to line 19.

"Q What did Mr. Meyer say to you?

"A I cannot pinpoint any one individual conversation. I can't recollect with any specificity any one individual's conversation."

At this point I call to the attention of the Court the totally contrary testimony that Mr. Lipkin gave at trial at page 694 --

MR. CRACO: I wonder if we can dispense with the parentheticals.

THE COURT: I would very much appreciate your dispensing with them, Mr. Pollack, and saving your argument for the appropriate time.

MR. POLLACK: Yes, sir.

At page 74, line 3:

"Q You note the clause "subject to the collectability of" is not included in the cover letter on Exhibit A-4 -- Exhibit A-4 is the statement that was pulled back.

"A Yes.

"Q Can you explain why there is a difference in these two cover letters?

"A I can see the differences and I can surmise why there would be a difference.

"Q And what are those?

"MR. CRACO: I object to the surmise.

"Q Do you know why there was a difference in these two cover letters?

"A Yes.

"Q Why?

"A Well, in the lastest numbered exhibit there is, I'm sorry, in the earlier exhibit number.

"MR. CRACO: Exhibit A-5.

"A (Continuing) In A-5 -- which is the financial statement that was ultimately used in the private placement -- there are a greater number of receivables, a greater amount of the contract which is being treated as a receivable and apparently the factor of including that item as a receivable led us to put the qualification on the report.

"Q What receivable are you talking about?

"A I believe it is a receivable due from the Ruderian group.

"Q The so-called Monterey Inns transaction.

"A Yes, sir."

At page 76, line 7:

"Q Which exhibit had the greater amount of receivables?

"A No. A-5.

"MR. CRACO: And by how much is the question?

"THE WITNESS: There is approximately \$780,000 of additional receivables included in A-5 over that in A-4. Additionally -- well, I'm sorry, that of the question you asked me.

"Q What does that \$780,000 constitute?

"A It appears -- I'm sorry. The statement presents the

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receivables from the Ruderian matter differently in A-3. It breaks it down between the long term portion of a receivable on contract and a current portion of the receivable on contract."

At page 79, line 19:

"Q Does Exhibit A-4 indicate a higher amount reported for current assets than Exhibit A-5?

"A No.

"Q Does it show a lower amount for current assets than on A-4?

"A Yes."

Finally, at page 111, line 13:

"Q Did you consider seeking accounting series release No. 95 in reaching your conclusion as to the type of an opinion you would give in connection with your audit of the Firestone Group dated December 1969?

A I think it was one of the factors which was taken into account."

At this time I would like to read in answer 8-B to the interrogatories.

"The persons who were present at the time the misrepresentations were made included Arnold Lipkin, Charles Chazen, Lee W. Meyer, Richard M. Firestrone, Martin A. Scott and Alan Scharf."

990a

I understand that it is difficult to place these in perspective out of context, your Honor. We will brief the significance of all of those readings in our post trial brief.

At this time, I would like to renew the motion to dismiss the third party complaint against Charles Allen. In the pretrial order, Laventhol stipulated, "Charles Allen never made any representations --"

MR. CRACO: I can abbreviate this. We consent to the motion as to Charles Allen personally.

MR. POLLACK: I make the same motion to Irwin Kramer.

MR. CRACO: That I will not consent to, your Honor. There is testimony linking him up.

THE COURT: I'll reserve decision.

MR. POLLACK: May I make my argument on Mr. Kramer.

THE COURT: Sure.

MR. POLLACK: Laventhol has stipulated in the pretrial order, "Irwin Kramer never made any representations of any kind to Laventhol in connection with Firestone."

Mr. Herzfeld's testimony was devoid of anything but a passing reference to one dinner that he had had with Mr. Irwin Kramer and the conversation was wholly insufficient to sustain a claim of any kind that Mr. Herzfeld bought the

security on the basis of anything that Mr. Kramer said.

I think that the case has been reduced -- there were originally 10 third party defendants -- six have been dismissed up until today, two have been dismissed today. The only two left are Irwin H. Kramer and Allen & Company, Incorporated, and I think that the, addressing myself first to the question of Irwin H. Kramer, the record is totally devoid of any evidence on which Laventhol could possibly claim against Irwin Kramer if they lose to Mr. Herzfeld.

THE COURT: How do you get to Mr. Kramer?

MR. CRACO: Your Honor, I am interested in Mr. Pollack's view of that dinner because Mr. Herzfeld's testimony was that he bought a second unit in reliance on what he was told in that dinner.

Mr. Kramer purported to recite the prospects of the company and to induce Mr. Herzfeld to invest.

Now, I don't think that the audited statements which were later supplied to Mr. Herzfeld after the closing confirmed the claims that were made for these units prior to the closing and prior to Mr. Herzfeld's acquisition of them.

But if in some way it should be held that they did confirm those statements, then the character of those statements as we have it now came in major disparity as to

one half of the units that were purchased by Mr. Herzfeld from Kramer and it seems to me that I am entitled to keep Mr. Kramer in and you are entitled when you determine whether there is liability of Laventhol and if so upon what theory to determine whether Kramer survives that determination.

THE COURT: I think so.

I'll reserve it.

MR. POLLACK: Your Honor, I also move to dismiss the third party complaint of Laventhol against Allen & Company, Incorporated on the basis of the admissions by Mr. Chazen and Mr. Lipkin. The sole possible basis for a claim over against Allen & Company, Incorporated by Laventhol would be on the basis that Lee Meyer was an agent for Allen & Company, Incorporated, in this transaction, and that he did something wrong.

I think the record is devoid of any evidence on that point but be that as it may, both Mr. Lipkin and Mr. Chazen were asked by me last Friday on cross examination, "Did you rely in any way in preparing the financial statement and in handling the Continental transaction on Lee Meyer.

"A No," in each case.

Therefore, I think that there is no way that Laventhol can properly hold Allen & Company, Incorporated in the case by Herzfeld against Laventhol.

MR. CRACO: Just briefly, your Honor, because I trust we can brief all these things in more detail.

But Kramer, of course, and everything I said about Kramer before, he was acting in his capacity as a representative of Allen & Company, Incorporated so everything I said about him rebounds to our benefit in this case but more to the point, we don't rest our case on any assumption that Meyer misrepresented facts to Laventhol. We rest our case for indemnification or contribution against Allen & Company on --- Incorporated, on the theory that if we are held to Herzfeld under the circumstances here, our financial statement had to be a part of a woven network of circumstances in which Mr. Feinberg's testimony adds another piece of yarn.

It seems apparent that when the financial statements came to Allen & Company, they were dissatisfied with what the audited statements showed and they set about making an explanation to the investors, so that they remained -- so that the units remained palatable to these investors. If notwithstanding the fact that the investors relied upon the sugarcoating that was put on the financial statements by Exhibit 6, the letter that went out in the Firestone letterhead and by the conversations that Mr. Feinberg and others went through to find out if they could still sell

these units, notwithstanding the nonconfirming financial statements of Laventhol, if notwithstanding the fact that they relied on the sugarcoating and not on the bitter pill, we are found liable, it seems to me that we have recourse against Allen & Company, Incorporated, who put on that sugarcoating for its effects, whether by way of contribution or indemnification as we shall brief.

But it seems to me that there is ample proof that the purveying of these units to people like Mr. Herzfeld was done by Allen & Company and not only with me -- Mr. Pollack himself attempted to adduce testimony from I think it was Mr. Goodman about whether he relied upon Allen & Company's willingness to close the transaction in coming to his investment decision.

Well, the evidence here, I think, shows that Allen & Company was not only willing to close the transaction, they were hot to trot and it is on that eagerness on their part to press these units upon the investors regardless of what the audited financial statement shows that we rest our case for indemnification and contribution.

MR. POLLACK: Despite the ability of Mr. Craco to turn a phrase, the record is devoid of any evidence to support his contention. Exhibit 6 to which he refers and which he pins his case for holding Laventhol in in their definitive case was a document prepared and distributed by the Firestone Group, Ltd. on the Firestone Group, Ltd. stationery. Allen & Company, Incorporated did not have anything to do with it nor is there any evidence in the record to sustain that position.

THE COURT: I will reserve decision.

MR. POLLACK: Your Honor, at this time I had come upon the knowledge quite late in the day after a conversation that I had with Mr. Ferry that your Honor might wish us to sum up. If so, I would respectfully ask that in the interest of making a clear and concise summary, that your Honor give us overnight to prepare.

THE COURT: No, you have an opportunity to brief it. I want a summary now while the facts are still fresh in my mind. Then I can hear briefs months from now. I don't expect them ever, summations, to be letter perfect.

MR. POLLACK: May I have five minutes to collect my thoughts on the matter?

THE COURT: I would think you probably would sum up not first but after Mr. Haimoff sums up.

MR. HAIMOFF: There are a few additional items of proof that I would like to offer if I may, your Honor.

THE COURT: All right, we will hear your proof.

MR. HAIMOFF: I would like to offer in evidence one additional excerpt from the deposition of Mr. Lipkin at page 65, "I received a call from Mr. Firestone while I was in Monterey.

"Q Telephone call, I gather?

"A Telephone call, while I was in Monterey attending a convention. Mr. Firestone stated that they were in the process of completing the sale of certain properties which they were acquiring, and he had -- I don't recall with whom he discussed it -- I assume -- I shouldn't assume -- I don't recall whom he discussed it with at our firm, but he was told that probably the profit of the sale would not be reflected in full on the income statement that we would be reporting upon, and he felt somewhat exercised by that, and felt that we should talk about it.

"I referred him to Mr. Chazen but told him that I would like to talk to Mr. Chazen first and make him acquainted with the situation, and I don't recall at that time whether he spoke to Mr. Chazen, but I believe he did, I believe he did."

Then there is some colloquy.

"Q You told Mr. Chazen with Mr. Firestone had told you over the phone about this transaction?

"A Yes.

"Q Do I understand then that at that time you had not seen any of the agreements that we have been referring to, or is my understanding incorrect?

"A To the best of my recollection, I had not seen the document at that time.

"Q Is there any way in which you can fix the date of that meeting since you say you were attending a convention?

"MR. CRACO: Telephone call, not meeting.

"Q The date of that telephone conversation, exactly, since you say you were attending a convention?

"A I can pin it down to one of four days.

"Q What would those four days be?

"A Somewhere between November 9th and November 12, 1969."

I won't stop now to argue the significance of it, your Honor.

THE COURT: Thank you.

MR. HAIMOFF: In addition to this deposition excerpt, I would like to offer in evidence an additional group of work papers taken from the documents supplied by the Laventhol firm in the course of the discovery proceeding, the document which I have in my hands, your Honor,

2 have to do with the procedures followed by the Laventhol
3 firm in connection with confirmations generally of accounts
4 receivable, and notes payable for the purpose of -- well,
5 I don't suppose I have to argue the purpose of it. I will
6 if I need to. I just want these documents in evidence;
7 I have discussed them previously with Mr. Craco over the
8 telephone. He told me he wanted to think about his position.

9 MR. CRACO: I told you no objection and I tell
10 the Judge no objection.

11 MR. HAIMOFF: Fine.

12 THE COURT: Please mark them and receive them.

13 THE COURT: How have we marked them just so we will
14 know.

15 MR. HAIMOFF: Plaintiff's Exhibit 37 marked in
16 evidence.

17 (Plaintiff's Exhibit 37 marked in
18 evidence.)

19 THE COURT: Do you have any objection to that, Mr.
20 Pollack?

21 MR. POLLACK: No, your Honor.

22 MR. HAIMOFF: I would like to offer in evidence
23 an additional work paper entitled "The Firestone Group, Ltd
24 Notes Dated December 3, 1969," and item 4 on this paper is
25 "Obtain signed copies of 'agreements to purchase'"

MR. CRACO: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 38 received in evidence.)

MR. HAIMOFF: I would like to offer in evidence an additional work paper entitled "The Firestone Group, Ltd., Notes," and specifically item 16, "Should we mention large sale to one customer - also not a syndication?"

MR. CRACO: May I see that? I don't think you mentioned that one to me.

MR. HAIMOFF: No, I didn't specifically.

MR. CRACO: I have no objection to the admission of the document.

THE COURT: Exhibit 39.

(Plaintiff's Exhibit 39 marked in evidence.)

MR. HAIMOFF: I have nothing further with respect to additional items of proof, your Honor. I would like, at this time, to move to confirm my complaint to the proof, specifically with respect to the evidence establishing specific nondisclosures in addition to the specific misstatements and misrepresentations which were alleged in the complaint.

The specific nondisclosures to which I refer is the evidence establishing that no reference was made in the

audited financials of the net worth of Continental Recreation, and there was no reference in the work papers or in Note 4 or in the statement to the inclusion in realized income of the \$185,000 in liquidated damages.

MR. CRACO: Your Honor, I don't want to press the argument at this point.

THE COURT: Motion granted.

MR. CRACO: I don't think it is pertinent.

THE COURT: Motion granted.

MR. HAIMOFF: I have nothing further, your Honor.

THE COURT: All right.

MR. HAIMOFF: Shall I proceed, your Honor?

THE COURT: You proceed.

I would just like, in broad outline, your summation.

MR. HAIMOFF: Yes, obviously, I have spent several hours this afternoon trying to figure out how to compress my argument in as short a space and I hope to do it in five or six minutes.

THE COURT: I don't want to rush you or press you. I would like a reasonable time for it.

MR. HAIMOFF: Well, I think perhaps the best way to begin is to call the Court's attention to the specific misrepresentations and misstatements upon which we rely.

1
2 In the first place, we contend that Exhibit 7, the
3 certificate to Exhibit 7, or the report which is sometimes
4 referred to as accountant's report, states, "Our examination
5 was made in accordance with generally accepted auditing
6 standards. We believe that the evidence establishes that no
7 such examination was made in respect of the Monterey
8 transaction.

9 "The report states further that in the opinion
10 of the auditors, subject to the collectability of the balance
11 receivable on the contract of sale," I stop at that point.

12 The collectability of the balance receivable. There
13 was no balance receivable under the contract. The contract
14 specifically conferred upon Continental Recreation an option
15 to convert what was called a contract of sale into a conven-
16 tional contract of sale. This is specifically provided for
17 in the agreement, which at that point, would have had the
18 effect of creating the obligation.

19 There was no obligation on the part of Continental
20 Recreation to do anything until that point.

21 Similarly, if your Honor please, there was no
22 obligation on the part of Firestone to put up any more money.
23 They put up \$5,000. That's all they were legally required
24 to do. The rest, the additional payment of \$3,900,000 was
25 due only in the event that they exercised their option

specified, provided for the in the agreement, to convert what was referred to as a conventional contract into an actual contract.

This is pointed out very clearly, if your Honor please, in the memorandum which was prepared by Miss Amberson on November 21, 1969, and is subsequently confirmed in a legal document.

This is a Plaintiff's Exhibit 17, and "We have the option to convert the contract of sale to a conventional sale using a grant deed and trust deeds on or after January 30, 1970.

In the event we exercise our option to convert, the contractual obligation of approximately two million dollars will be converted to a second trust deed."

MR. CRACO: Your Honor, I detest interrupting opposing counsel in summary except where it is absolutely necessary, but I must remind you that you received the Amberson memorandum explicitly over my objection as to hearsay limiting its effect to the fact that it was in the work papers and not for the proof of its contents. It is now being offered here for the proof of its contents, which is exactly what you excluded.

THE COURT: Well, don't worry. I remember how I received it. Please don't interrupt.

MR. CRACO: All right.

THE COURT: I am sure the record reflects exactly how I received it. My own recollection it was for the very limited memorandum. Amberson was the secretary.

MR. HAIMOFF: To Mr. Scott?

THE COURT: To Mr. Scott..

MR. HAIMOFF: If your Honor please, I am perfectly content to accept the limited purpose for which Mr. Craco says the document was offered, and introduced. The point that I am making is, whether it is true or not, this was the information that was available to Laventhol, and this was the information which they had in their files, and this is the provision in the basic agreement which was subsequently entered into which specifically provides in Exhibit B annexed to the agreement which is Plaintiff's Exhibit 12, "Buyer reserves the right at any time after January 30, 1970 or upon payment of the \$3,970,000 cash down payment as required herein to convert this contract of sale to a conventional sale at which time title shall pass to buyer."

Where is there any obligation on the part of the buyer to exercise the right which this contract specifically gives him? There is nothing specific in the agreement which imposes the obligation upon him, and the fact of the matter

1 is that when Continental Recreation didn't come up with the
2 money in January, neither did Firestone.

3
4 So that our basic position on these documents
5 is that they represent a farce, a series of papers designed
6 to create the appearance of a transaction or of a contract
7 which has the effect of increasing the sales from six million
8 dollars to 22 million dollars, and which had the effect of
9 converting a profit and loss statement from a deficit into
10 a profit.

11 Our position is, your Honor, that what really
12 happened here is this:

13 Bearing in mind this excerpt from the Lipkin testimony
14 that I just read, that initially the Laventhol firm had
15 decided not to record the transaction at all. When Firestone
16 told Lipkin or told Chazen about this, these hospitals, he
17 was in the process of acquiring; now this is November 12th,
18 according to Lipkin. He was in the process of acquiring,
19 and in the process of selling.

20 What he was really told was that they could not
21 record that kind of ephemeral or nebulous transaction in the
22 balance sheet or profit and loss statement which seems self-
23 evident.

24 So what must have happened, and I think no other
25 inference is justified by the documents, is that a memorandum

is prepared, and for some strange reason Scott doesn't prepare the memorandum, Firestone doesn't prepare the memorandum, Miss Amberson is asked to prepare the memorandum, and it is dated as late as November 21st.

Apparently based on that memorandum, it was hoped to persuade the Laventhol firm to accept this transaction as if it were real and genuine. At this time they had no documents. All they had was this memorandum.

And the dramatically significant aspect of this document, if your Honor please, is that the transaction, the terms of the transaction are stated to be 10 million dollars as the purchase price, and \$11,400,000 as a selling price. This is on November 21st, and your Honor will bear in mind the fact that the profit and loss statement or projected figures included in the stock and note purchase agreement, in that document there had been a reference to 17 million dollars in sales; and Mr. Wadley testified that the sales figures he gave to Firestone amounted to six million.

Well, the arithmetic is very clear if your Honor please, and very eloquent.

Six million plus 11 million is 17 million and that is what they hoped to get away with at that time.

What happened after that is apparently they decided this would not do, so they decided they needed written

1 agreements, and there is that work paper which says, "Get
2 signed copies of agreements."

3
4 So then, and this is another, I believe, your Honor,
5 dramatic evidence of the fraud that was being perpetrated
6 and which I believe was palatable, Firestone supervises
7 the preparation of these agreements. There are two agreements
8 one for 13 million and one for 15 million. There are so
9 many suspicious aspects of it.

10 I interrupt myself to call attention to Firestone's
11 testimony about the fact that Ruderian was a tough bargainer,
12 he never gave an inch.

13 Well, according to the testimony, and there is no
14 other person who appears on the scene to have been even a pros-
15 pective purchaser, according to the memorandum, on November
16 21st, the purchase price was \$11,400,000.

17 On November 26th, five days later, this tough
18 bargainer, this man who wouldn't give an inch, had given up
19 an additional four million dollars. Well, it just doesn't
20 make sense. What must have happened is, and no other inference
21 is available from the circumstances, what must have happened
22 is two things.

23 They needed contracts and they decided they needed
24 a bigger profit, so therefore the thing was arranged in the
25 form which these agreements took.

Now, what happens after that? At this point, apparently the Laventhol firm is sold. At this point, if your Honor please, the journal entries reflect the picking up of this entire two million dollars of profit and the trial balance is adjusted and the entries are made solely by the Laventhol firm and the documents indicate -- I won't bother to review them in detail now -- the documents indicate that as of the date these adjusting entries were made originally, the entire profit was to be picked up.

Well, now, perhaps that decision was made by Lipkin. Perhaps he had not previously reviewed it with Chazen, although the evidence is somewhat in confusion on this point.

In any event, what undoubtedly happened after that is somebody reviewed the papers, whether it was Chazen or somebody else and they decided that they couldn't get away with that kind of a situation in which on the basis of two contracts in which a \$35,000 deposit was paid by Firestone and a \$25,000 deposit was paid by Continental to create by their own bootstraps, so to speak, a profit of two million dollars.

But they had another problem. If they left the transaction out entirely, Firestone would show a loss and this obviously was something that could not be tolerated

and in this connection, I call your Honor's attention to the testimony given by Mr. Lipkin in which he said he had a meeting with Mr. Firestone and Mr. Sharp and in which they said, they threatened to take the account away and in which they threatened to sue him unless he did something.

So, I would like to call your Honor's attention to another work paper which refers to the estimate, the Firestone Group, Ltd., notes, estimated loss, four months ended April 30, 1969, estimated loss, seven months ended 11-30-69, loss before sale to Continental Recreation. Profit on sale to Continental Recreation, profit before income taxes, two million thirty and a million two hundred fifty one.

So that, therefore, in order to satisfy Firestone, to avoid under this threat of litigation, under this threat of losing the account, they decided to pick up enough of the profit in order to create a situation in which the profit and loss statement would show at least a profit and rather than a deficit.

So then they arrive at this device of picking up two items. \$25,000 which hadn't been paid yet and \$185,000 as the provision for liquidated damages which would become payable only in the event that the transaction was not closed and the explanation which they have developed for thus including in their earnings a payment of \$185,000

payable only in the event the transaction did not close and at the same time including in sales 17 million dollars which would be includable only if the transaction did close, they decided to adopt this theory -- that if the transaction did not close, then the payment would be recovered anyhow.

Well, frankly, your Honor, I don't see it but let's say there is some nebulous theory or ethereal theory on which you can justify that kind of reasoning.

It seems to me that if that is what you are going to do at least an investor ought to know it. You ought to tell him in plain language, we have included the sale of 17 million dollars which is on the assumption or predicated upon the proposition that the transaction will close but if it doesn't close, there will be \$185,000, so therefore we picked that up in realized income. That the investor is not t-ld about.

So, if your Honor pleases, I think that summarizes briefly the principal items of proof in the case which, while there are various other items which I could mention, this business of legal assistance. Mr. Firestone indicated under examination by Mr. Craco that in connection with the preparation of the documents he had obtained legal assistance from one or two firms, he didn't quite know which. He never specified what legal assistance he obtained. He talked,

1 I don't think I need to set forth in any detail
2 the evidence with respect to the conversation between
3 Lipkin and Chazen on the one hand and this man Borah on
4 the other.
5

6 Your Honor, it's a joke. To think of getting a
7 lawyer's opinion as to the validity or enforceability of
8 contracts involving on the one hand a 13 million dollar pur-
9 chase price and a 15 million dollar sale price and then to
10 say, well, on the telephone, we gave him all the information
11 that we thought was relevant and we didn't hold back any-
12 thing, well, it would have been a very simple matter to say,
13 Mr. Borah, will you please come to our office or go to
14 his office and show him the contract and, of course, they
15 didn't do that.

16 And so, if your Honor please, this transaction in-
17 volves the structuring of a purchase and sale solely for
18 statement purposes. I don't know whether your Honor has
19 had occasion to be familiar with other cases in this field,
20 which the SEC has been investigating for a period of years,
21 especially in 1969 and 1970, when many corporations were
22 really doing the same thing and accountants were going along
23 with it.

24 Hopefully, this will be the end of this type of
25 situation in which accountants lend their assistance and lend

1 he mentioned the Milbank Tweed firm in New York, and another
2 firm in Los Angeles.
3

4 Now, in the records of Firestone, there is proof
5 of the number of lawyers who were at that time actively
6 engaged in rendering day to day legal services for Firestone.

7 In November, the records show, which I've offered
8 today, that one firm in Los Angeles had rendered, performed
9 160 hours of work in November. It is not conceivable that
10 the Laventhol firm would not have known about these accountants,
11 these lawyers. They are reflected in the documents, they
12 were paid very substantial fees, they must have been in there
13 all the time.

14 Why didn't they get some legal assistance from this
15 firm that was working on a daily basis with Firestone?
16 Instead of that, Firestone says he went to lawyers in New
17 York and he went to another firm of lawyers or another firm
18 of lawyers in Los Angeles.

19 But even beyond that, who does the Laventhol firm
20 call when they want to get an opinion? There are three or
21 four firms of attorneys working on almost a daily basis or
22 very regularly for Firestone. There are other firms which
23 Mr. Firestone mentioned -- Milbank, Tweek or this other
24 Pact firm -- they find another lawyer and they call him on
25 the telephone and they get that opinion.

1
2 their aid to corporations which are anxious to sell stock
3 and which have to pretty up their statements in order to
4 consummate their sales.

5 I suppose I should say a word with respect to
6 reliance by Mr. Herzfeld. That is an additional point which
7 has nothing to do with the liability. There are two aspects
8 of that.

9 The question is, as a matter of law, what do we
10 have to show. Our position on that, your Honor, is that
11 we don't need to show specific reliance on the statement
12 and I think Mr. Craco's trial memorandum confirms this. What
13 we have to show is proximate cause or to use the word that
14 is sometimes used in the case, a nexus, between the alleged
15 misrepresentation and the purchase. That there is absolutely
16 no dispute about.

17 Your Honor has heard the testimony about the con-
18 versations between Firestone and the Laventhol firm and
19 Allen & Company who obviously were dependent upon the audited
20 financials to consummate the transaction. It's obvious that
21 if there had not been these financial statements, the
22 transaction would not have closed.

23 But beyond that, if your Honor please, it seems
24 that even if that were not so, we have the misstatements
25 in the income statement -- 15 million dollars of misstatement

1 in the sales item and there is no Note 4 annexed to or
2 contiguous to that 22 million dollar item. The cost of
3 sales, a very big and a very active company, 19 million
4 dollars. Well that 19 million dollars, 13 million dollars
5 was, if I may use the expression, this phoney purchase by
6 Firestone, so you have got here two false statements with no
7 note attached to them and then you have the preferred gross
8 profit, Note 4, and that Note 4 is, the only way I can
9 describe it, your Honor, is a deliberately false statement.
10

11 I would like to, if I may, just take a moment
12 to read the first two or three sentences.

13 The Firestone Group, Ltd, acquired by contract of
14 sale a group of convalescent hospitals containing approximately
15 1,900 beds.

16 Now, the fact is that the Firestone Group had
17 acquired nothing at that time; they had committed themselves
18 or had paid \$5,000. They had no title. All they had was an
19 option as I have indicated to convert the transaction into
20 a genuine one by putting up four million dollars which they
21 never did.

22 But a very, very interesting aspect of this sentence
23 is that there is no reference to the date when Firestone ac-
24 quired the hospitals. There is nothing to indicate here
25 that Firestone didn't own these hospitals for weeks or months

or perhaps a year. Then it says the properties were leased back to the former owners.

Well, we still haven't seen the lease. That is clearly something and it is not in the work papers, so apparently this was something which they took on faith from the Amberson memorandum.

Then they say and this ties in with the omission of the date in the first sentence -- in November, 1969, the company sold the properties by means of a contract of sale.

Now, nobody can tell me, if your Honor please, perhaps I shouldn't be so firm about it, that it would not be relevant to an investor to know that this so-called purchase occurred on November 22nd and the sale occurred on November 26th. What better proof can you have of a transaction created just for statement purposes other than the fact that both transactions take place in the week before the end of the period for which the statement is being prepared.

The statement was being prepared for November 30th. This is a purchase on November 22nd, the sale on November 26th, neither of those dates is specifically mentioned. They decided to say in November, 1969, the company sold the properties. They don't say on November 26h and they leave out any reference to the date when the Firestone Group

acquired the property.

I probably could go on for a long time yet, if your Honor please, but it seems the evidence is overwhelming that the Laventhol firm knew or should have known that this transaction was a phoney and was constructed just for the purpose of the statement and that Mr. Herzfeld was vitally misled when he read this statement, was shown a deferred profit of two million dollars and sales of 22 million dollars, all of which or 80 per cent of which was predicated upon this fictitious transaction.

MR. POLLACK: If your Honor please, I am sure that sitting in the position that your Honor does each day that you are well familiar with the law applicable to the case at bar. I will not take the time of the Court on that aspect of the case. I will reserve that for the briefs.

I would like to try to bring together the facts of the case as we see it because I think it is difficult as a person hearing it for the first time as your Honor did to see what the consecutive patter is when so many witnesses have testified.

This case deals with a period of not much more than 30 days in late November and December, 1969. Laventhol was engaged to do an audit. They knew that the audit was being done for the purpose of a private placement by the Firestone

Group and so admitted in their testimony. The audited financial statement shows sales of 22 million dollars, show net income of \$66,000 and shows a positive current net assets.

In fact, the sales were not 22 million dollars. In fact the income was not \$66,000 and in fact there were not positive current assets.

The statement was predicated on this so-called Continental Recreation transaction and the Continental Recreation transaction as your Honor has heard repeatedly constituted 15 million of the 22 million dollars booked as sales on this financial statement.

The evidence is perfectly clear and beyond any dispute that there were no minutes of this transaction, there was no resolution authorizing this transaction, there was no title report, there was no Dun & Bradstreet, there was no legal opinion, there were no entries on the books, there was no title insurance, there was no closing statement, there was no guarantee of the transaction, there was no written confirmation of the enormous receivable of 15 million dollars.

Laventhol knew that the alleged purchaser under the contract had an inadequate net worth to do a 15 million dollar transaction. Knew that it had a net worth of only \$100,000. They knew that neither Ruderian nor Spiegel

had guaranteed the contract personally.

In short, there was no evidence on which they could properly have put their name to a statement which took that 15 million dollar transaction into sales. And which implication is for both the income statement and the current net assets statement.

Richard Firestone himself, whatever other problems he may present to the Court in his testimony, testified squarely that Firestone never acquired the property at page 564 of the transcript. He also testified that Firestone never sold the property.

In other words, this was at most a paper transaction. It never occurred. Firestone didn't have title to the property at the time that Laventhol put it in the statement. Firestone never had title, Firestone never sold the property to Continental.

The transaction was purely a convenience for Richard Firestone to which Laventhol and Mr. Lipkin in particular bent his will as a servile accountant. He abandoned his professional responsibility to ask hard questions to get evidence to make demands and ultimately to refuse to certify the statement.

There are several conversations that were testified to in this trial that are quite critical.

First, there is the conversation with Borah, the attorney in California, which took place according to Mr. Lipkin at the trial sometime during the week, the first week of December, during the audit. Mr. Lipkin testified at great length to the details of that conversation, that he, Chazen and Zeman of Laventhol had with Mr. Borah on the telephone.

In his EBT, Mr. Lipkin was asked about the question of an attorney and whether they had contacted one. He couldn't remember a name. He thought that Schwalb and maybe he and Schwalb had contacted one. He didn't remember any of these many details that he presumed he could remember at trial after the opportunity to create a different story had arisen.

Further, Borah allegedly gave an opinion on a contract that he never saw. Borah, as your Honor correctly observed, was only a taxiride away. What attorney worth his salt gives an opinion on a contract that he has never seen, what accountant worth his salt takes such an opinion if indeed such an opinion was given?

IT is inconceivable that such an opinion was given in my judgment because there is no reference to it in the work papers and because it is the standard practice of accountants to note important things in the work papers, confirmation as to the legal aspect of this transaction

surely was an important matter to Laventhol. It was important enough for Lipkin to go to Chazen about it and Zeman and yet there is no reference whatsoever in their work papers to this conversation with Borah. If any such conversation had taken place with Borah, why didn't Mr. Borah come to court? Why didn't he testify? If he was as friendly with the Laventhol firm as they said he was, that he had done things over the year for and with them why didn't they bring him here. We brought everybody from California that we needed. They didn't bring Borah to substantiate the claim. Lipkin in the deposition couldn't give the specifics of getting an opinion.

I think that the story was concocted for this trial.

1 The next conversation that is of considerable
2 interest is the conversation with Ruderian. The Ruderian
3 conversation is another extraordinary conversation.
4 Apparently there was only one such conversation to confirm
5 this receivable, which constituted 70 per cent of the
6 sales of this company. There is no request on the part
7 of Lavenhol to Ruderian, "Send me a note by hand. We
8 will send a messenger over, confirming this transaction."
9 There is no written record of a conversation with
10 Ruderian.
11

12 Schwalb kept the work papers. He could just
13 as easily have put something in the work papers if there
14 were a conversation on this. It's standard practice for
15 an accounting firm to note down the important contacts
16 that they make. They acknowledged that on the witness
17 stand.

18 There is no evidence that this conversation with
19 Ruderian ever took place. Indeed, one asks again, where
20 was Ruderian? Why didn't he come to court? Why didn't
21 they fly him in? Is it because he wouldn't have substan-
22 tiated their testimony on this conversation? I don't know.

23 In any event, they didn't even take his deposition.
24 The unexplained failure to produce these witnesses I think
25 is susceptible of a very good inference against them as to

what these people would have testified.

On the Ruderian conversation it is the two witnesses from Laventhol, Boyer and Lipkin, give your Honor a very good guidepost for determining credibility issues in this case. They testified at some length about conversations with Meyer; Meyer said he had no such conversations.

Feinberg, a disinterested attorney, got on the stand, he substantiated Meyer's position.

But how does one pick between these conflicting claims of conversations? I think a very good guide is to compare internally Lipkin and Boyer. It's such a remarkable contradiction and on such an important aspect of this case, this alleged Ruderian conversation, I am going to take the time of the Court to read just the two answers that these two men gave to these questions. I asked Mr. Boyer in front of yourself:

"Q Did Mr. Ruderian in the conversation you had with him tell you that there was a group of Hawaiian investors who were going in on this transaction with him?

"A No.

"Q He said nothing whatsoever about that in that conversation?

"A No.

"Q Did you ever hear of Hawaiian investors being involved with Ruderian in this transaction?

"A No."

That is partner Boyer.

Let's hear what partner Lipkin has to say:

"Q You were in the room?

"A I was in the room. It was on a speaker phone. Mr. Ruderian told Mr. Boyer all this. He told him he intended to go through with this, that he thought it was a good deal, and that he had a group of people in Hawaii from whom he had raised considerable other sums of money whom he intended or already had contacted in connection with this matter and was very anxious to go ahead with this matter.

"And he indicated that this was a desirable deal from the standpoint of the people to whom he normally went for investors."

And so on.

And he embellishes his conversation with the conversation with Ruderian and the participation of the Hawaiian investors.

So on the one hand you have Boyer saying there was no such discussion, it was Ruderian never mentioned Hawaii and investors as being the ultimate purchasers under

this deal, and Lipkin saying, "Oh, yes, he mentioned them," and he was eloquent about it.

I have talked about the Borah conversation, and about the Ruderian conversation. I'd like to talk for a minute about Schwalb. Where was Mr. Schwalb? Mr. Craco said, "Well, he is outside the subpoena jurisdiction of this court," that may be so, but your Honor gave him an opportunity to stop the trial and conduct a deposition of Mr. Schwalb.

Mr. Craco, for his own reasons, kindly declined that offer.

The failure to produce Mr. Schwalb is a very serious matter. Mr. Schwalb wrote a work paper which I read into the record and which I will advert to again to the Court, in which he said Laventhol will not book this as a sale because the deposit is too small.

That is a very serious matter, and I think it raises a very important inference as to why Mr. Schwalb was not brought in here to testify. They attempted to get into evidence certain things that they say Schwalb did by having Lipkin testify that Schwalb told him he had done those things. That doesn't prove it.

I still think that for these purposes, that is hearsay and does not prove the fact that Schwalb did any

1
2 of these things. They could have proved it more directly
3 through Schwalb. No reason why they couldn't. This trial
4 could have been adjourned to go out and take a deposition
5 of Schwalb.

6 I think that the absence of the production of
7 Schwalb is a matter that Laventhol cannot get beyond in
8 attempting to explain what they did here, because I think
9 that the structure was such that the business arrangements
10 were made for this audit and for this way this whole thing
11 was going to be done between Mr. Lipkin and Mr. Richard
12 Firestone. I don't think Schwalb really knew what was
13 going on.

14 Insofar as there is any evidence of what Schwalb
15 did, it is the work papers and the audit review questionnaire
16 which he filled out. Schwalb checked in that box, and I
17 read it to your Honor early in the trial, he checked in
18 the box that he had reviewed the corporate minutes relating
19 to all material contracts.

20 Well, if this 15 million dollar contract wasn't
21 material, what was? Where were the minutes for it? Why
22 didn't Schwalb raise the question with Lipkin? Why didn't
23 Lipkin raise the question with Firestone? Why didn't
24 they say, "We can't go ahead with this statement until there
25 is at least some appearance, some corporate action to justify

our going ahead with this."

The mere piece of paper that Firestone showed them, these two contracts, weren't worth the paper that they were typed on. They weren't notarized. The corporate seals weren't on them. The first one was executed and bore a date of November 22nd, a Saturday, just before the close of the audit. That is the Monterey one.

The second one was November 26th, the day before Thanksgiving, and the day before the audit.

Firestone evidently got a pair of his friends to sign pieces of paper which he then presented to Lavenhol and between them they decided that these were contracts which constituted sales; purchase by Firestone and sale by Firestone.

Dick Firestone testified that Firestone Group, Ltd. never acquired the properties, and never sold the properties.

On the question of Mr. Meyer and his role in this case, we got him here to testify under subpoena. I think he testified honestly and openly. We brought him back without fear. He made a mistake. He acknowledged that he made a mistake on whether Lipkin was physically present on the 15th and Fainberg corrected him and said, no, Lipkin was on the telephone. He wasn't physically present. Meyer

acknowledged that mistake. He was not cross examined about that change of his recollection of that date.

I point out to you that Mr. Lipkin denied that there was any such conversation on December 15th. Mr. Feinberg, an attorney of repute in this district and at the Bar here, testified that there was a lengthy conversation to California in which they went over this financial statement. Mr. Lipkin doesn't remember any such conversation.

I ask you as between Mr. Lipkin and Mr. Feinberg, who is the more credible?

There is another aspect of this case, which is something that we will brief at length, and that perhaps did not emerge in its full import in the course of the trial, and that is the question of the two statements issued by Laventhol.

Mr. Lipkin testified that he did sign two statements, A-4 and A-5. They pulled back A-4. They pulled back A-4 and issued A-5, which had \$780,000 by Mr. Lipkin's own testimony which I read into the record, more in current assets. It turned a current deficit into a current surplus, in the asset column. That was why they issued a second statement.

The qualification that they put on the second statement was not adequate, "Subject to the collectability

of the balance receivable."

That merely means that there is a deal and that it is just a question of collecting the money. It doesn't cast doubt on the deal; as they themselves admitted in their testimony.

Laventhol either should have cast doubt on this deal because it had utterly inadequate evidential matter on which to base it upon, or should have given no opinion at all? But instead, Mr. Lipkin bent his will to Mr. Firestone's wishes and he did what Mr. Firestone wanted him to do.

I think that the keynote on that point is sounded by Exhibit A-3 to which I adverted in my opening statement 11 days ago. That memorandum is dated December 2, 1969. It's from Richard Firestone to Arnold Lipkin. The last paragraph in referring to Mr. Ruderian says, "Arnold, this man and his companies are very valued contacts so if you speak to him please handle him with kid gloves. We don't want to lose him for future transactions."

Well, what responsible auditor takes advice of that nature from a company as to which they are charged with acting with independence? What is this business of an auditor handling the confirmation of an account receivable of this size with kid gloves?

1 I think that that is the problem that arose
2 here. Laventhol forgot what its role was and joined Mr.
3 Firestone in his zeal to put out a statement which would
4 be sufficient to induce Allen & Company, Incorporated,
5 which has a fine reputation in the investment banking
6 field, to prop. this transaction.
7

8 Turning for a minute to the point which I am
9 sure Mr. Craco will stress rather than stressing the
10 evidence about what Laventhol did and didn't do and what
11 Laventhol could and could have done and what Laventhol
12 said in its financial statements and what Laventhol didn't
13 say in its financial statements, let me turn for one
14 moment to the procedural aspects of the case on the Allen
15 side.

16 The question of these oral assignments. Mr.
17 Duff is an attorney of repute in the Holtzman, Wise &
18 Shophard firm. He testified that the assignments of these
19 interests in 1971 were procured under his supervision, that
20 in some cases he negotiated them himself, that in every
21 instance, it was an understanding of the deal that the
22 assignment include all of the rights of the purchaser to
23 sue.

24 Allen was really quite with its back to the wall
25 in '71 on these securities. They had some disappointed

customers, and I think that felt that as a business matter they had to take them out, but in so doing they never abandoned their rights to pursue the ultimate man on the bottom here which was Laventhol.

In one case in a letter prepared not by the Holtzman firm but by the other attorneys, that is to say, the attorney for the purchaser, and that is Mr. Elliott Hyman's assignment, there is an express assignment of the right to sue. In the other cases, in the assignments for the purchases conducted by Duff they didn't use that language. We don't think that the language is a talisman.

The law in New York, and we will brief your Honor directly on this point, is that an oral assignment of a claim is valid. Such oral assignments were intended. Such oral assignments were made. They were implicit and they were explicit.

We brought as cumulative proof of that point one such purchaser from the original deal who assigned his units and his claim to Allen. That is Mr. Maurice Goodman.

He has no interest in this matter. He has no reason to say the other than as it was, and he testified, and it was implicit and explicit that the assignment include the rights to sue.

Obviously, if Allen was going to take these people out, it wanted the right to get its money back from the persons whom it considered to be the wrongdoers in this transaction.

On the question of reliance, again, we will brief the legal aspects of that, I do not think under the Ute case, which is the law of this land cases, reliance need be shown in an omission case but as I said to your Honor, if the need be shown, it was shown very clearly out of the mouths of Laventhol themselves who acknowledged that they know that the statement was being prepared for Allen & Company, Incorporated in the private placement, it was established by Meyer who said he wouldn't have closed unless he got an audited statement. It was established by Maurice Goodman and confirmed by Maurice Goodman who said that he read it and he wouldn't have bought had the statement not been received with his package of materials.

I think that the question of reliance finally is something that is readily inferable from the circumstances. Mr. Feinberg testified. Mr. Meyer testified that the key thing that everybody was waiting for was the financial statement. It was the thing that had been held up to December 15th. Obviously it was a prerequisite to closing.

On that basis there is no doubt that this financial statement was something that was relied on either by the ultimate purchasers in whose shoes Allen & Company, Incorporated as assignee stands, or if your Honor chooses to say that it has to be demonstrated to be reliance by Allen & Company, Incorporated, the reliance is testified to by Mr. Meyer.

On the question as to Mr. Meyer, and as Mr. Craco would like to say, his involvement with the company, the testimony of everybody is perfectly clear that he was an outside director, he was relying on the auditors to do the statement, he neither told them how to do it nor did he have in his possession the documentation or knowledge to tell them how to do it. He didn't have this Continental contract. He didn't have accounting skills; and in any event, both Mr. Lipkin and Mr. Chazen testified that they didn't rely on Meyer in determining how to handle this transaction. This was a decision of theirs. It was not a decision made by Meyer and Meyer did not exert any influence on them in that connection.

There are two main bases of liability as we see it in this action. One is that the action is of Laventhol were woefully short of generally accepted accounting principles which require under the due care standards

appropriate evidential matter of material transactions in justifying the statement and which require appropriate confirmation of receivables. They could have gotten a writing from Ruderian. They could have gotten a writing from Borah. They didn't.

And 'secondly, the broader and more pervasive standard of the Federal Securities Laws which deal in misleading statements and misleading omissions. Even if your Honor should find, as we do not believe is possible, that Laventhol did meet the test of generally accepted accounting principles, if your Honor feels as we do, that those don't go far enough, you are still free to find liability under 10B5, because under the doctrine of Chasens against Smith Barney and other cases in recent years, industry practice is no different.

If the statement is misleading or if the omissions are misleading, your Honor has a right to find liability regardless of whether the accountants get on the stand and say that it is the way accountants generally do it.

The brokers in the Smith Barney case got on the stand and said, "Well, we do not, no one in the industry reveals that we are marketmakers. It isn't industry practice."

Well, the Court of Appeals said, "We don't care what industry practice is. It was misleading not to

1 toll them. It was a material omission."

2
3 The number of omissions from this financial
4 statement are legion. Laventhol didn't say that it had
5 made an inadequate audit, which I think the testimony
6 showed that it did. Laventhol didn't say that it didn't
7 have written confirmation of this receivable. Laventhol
8 didn't say that the purchaser had a net worth of \$100,000.
9 Laventhol didn't say that it had no D&B, that it had no
10 financial statement, that it had no other proof of Ruderian's
11 company's ability to go through with this transaction. All
12 of these omissions are material.

13 I think that they would have boggled the minds of
14 Allen and the ultimate purchasers had they been on this
15 financial statement.

16 Similarly, we think that the statements themselves
17 contain misleading and false representations, those already
18 adverted to buy Mr. Haimoff, to wit, that Firestone in
19 November 1969 acquired by contract of sale certain properties
20 and Firestone sold certain properties. The evidence is
21 perfectly clear that they never acquired nor sold.

22 I think on that basis, your Honor, Allen &
23 Company, Incorporated and Allen & Company which purchased
24 these units in wholly appropriate, legitimate, and fully
25 disclosed transactions, is entitled to its money back

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2 on the losses that it sustained as a result of the Laventhol
3 statements.

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Mr. Craco

MR. CRACO: If it please the Court, we have come, I think, to the end of this trial and let me try to present the issue from the perspective of the defendant and third party plaintiff.

It seems to me that it breaks up into three parts. First, can it fairly be said on the evidence that has been presented that the audit and the financial statements of the Firestone Group to which the certificate of Laventhol were attached, was attached, were knowingly and willfully misrepresented.

Second, can it be said on this record that Mr. Herzfeld used that financial statement in any significant way in making his investment decision and, third what do we say about the role of Allen & Company in the initial transaction and in the subsequent acquisitions of the units from various investors.

I think some parts of this case turn on credibility. I think your Honor is entitled to recall for example that auditors' fees don't turn upon the question of whether or not a private placement is consummated but underwriters' fees do.

You are entitled to measure the demeanor of Mr. Meyer when he coolly and with some insolence came in and told us in some detail of the personal conversation he had had with a man who had not been in New York for 35 years and

then when corrected by credible testimony to the contrary came back and recanted here today.

I think you are entitled to look at Lipkin and determine for yourself whether you think he is a man who would come into this court and perjure himself about such matters. I think you are entitled to look at Chazen and the credentials he has brought to the profession of which he is a distinguished member and ask whether he has lied or whether he committed fraud in the initial circumstances of this audit.

And under all these circumstances, I think you have to come back to what on the audit is the first question and that is, did Laventhol commit fraud when it executed the opinion which it ultimately rendered.

Now, there has been two features of the case by both Herzfeld and Allen & Company on its counterclaim to which I feel obliged to advert somewhat strongly.

The first is that they are herewith a case of 20/20 hindsight and the pious wish that it all had never happened. Well, with that we can all agree. But that is not the test that an auditor in the field is obliged to apply. He is obliged to report on facts as he says them after he makes certain checks which are under the circumstances accepted by his profession and which are under the circumstances

2 appropriate to the occasion. And 20/20 hindsight proving that
3 the transaction later failed is quite a different thing from
4 saying that it was fraud to report it as it was found in
5 November of 1969.

6 The second thing is likened to the first and it
7 is this -- I would be cowed Judge, in talking about the
8 audit aspect of this case as distinguished from the position
9 of the respective plaintiffs here of which I'll have enough
10 to say later.

11 I would be absolutely frightened to death about
12 addressing that issue if counsel's hypotheses and counsel's
13 statements supplied evidence. We began this case character-
14 izing it in Mr. Pollack's phrase as a case of a servile
15 accountant who bent his will and we finished the case with
16 Mr. Pollack saying that. We began the case with Mr. Haimoff
17 saying that this was, this transaction was an obvious fake
18 and we have ended the case with Mr. Haimoff saying the same
19 thing.

20 The problem is that between the first utterance
21 of those incantations and the last utterance of those incan-
22 tations, there hasn't been any proof to support them and
23 they go to the question of whether there was scienter.
24 They go to the question of the state of mind of Laventhol at
25 the time that they audited this transaction. They go to

the question of whether or not they correctly reported the transaction which later failed or whether they fraudulently reported the transaction which never existed.

Now, this transaction was not a farce. Mr. Pollack knows his way to 375 Park Avenue because that is where he got Mr. Meyer to come down here and testify but he didn't go to Mr. Firestone who also occupies himself at 375 Park Avenue to find out what the circumstances underlying the transaction were. We did and we could have rested, your Honor, on the case as it was, absent of any proof of the underlying validity of the transaction.

We could have said that these two plaintiffs have not shown to this Court by any credible evidence that will stand up before this Court or on appeal that the transaction was in fact hokum, that there was no real transaction. We could have rested on that but instead we brought Firestone in to tell you about the transaction as it was and what was his uncontradicted testimony? It was not that the transaction was done by a pair of friends the week before Thanksgiving for the purpose of giving effect to a financial statement on the eve of a private placement.

On the contrary, he talked about the lengthy negotiations with Monterey, he talked about the difficulty

1 he had of extracting documentation from them. He talked
2 about the bargaining with them about the various aspects
3 of the price. He talked about his bargaining with Ruderian
4 whom he characterized as a tough negotiator. He brought
5 you back to the time when those negotiations began and
6 without effective cross examination and without contradiction
7 and without denying it and without being shaken in one
8 respect on the subject, he validated for you the bona fides
9 of the negotiations which led up to the transaction.
10

11 It seems to me that he gave flesh and blood to
12 this transaction. Now, he was here and he could have been
13 shaken if in fact he were not telling the truth. He was
14 the man who knew about it. Wadley said that he was the man
15 who knew about it and he was the man to whom the auditors
16 went to find out about the transaction.

17 Now, we were promised some deep dark secret had
18 transpired. We were told that Lipkin had met secretly with
19 him in order to concoct the transaction. Mr. Pollack told us
20 that in the opening and of course that proof never materialized
21 in the course of the trial because that was utter fiction.

22 What happened was, I think on a fair construction
23 of the evidence, that Firestone had engaged in an adequate
24 course of negotiation with Monterey, had matured a transaction,
25 had entered into a contract and had signed it. That he had

1 entered into a long and tortuous course of negotiations with
2 Ruderian, that he had struck a deal with Ruderian and he had
3 signed it up.
4

5 And we know from Firestone's testimony and we
6 know from the testimony of the auditors who were familiar
7 with the course of dealing in California under those circum-
8 stances when contracts of this character are signed up in the
9 business of land syndication in California that that is
10 regarded by the principals to such a transaction as a
11 binding economic event and I emphasize an economic event be-
12 cause I do not think, your Honor, that you are called upon
13 to sit as a California Court to determine whether or not
14 under circumstances retrospectively examined you would have
15 given specific performance to these contracts.

16 I do think you are asked to determine whether or
17 not the accountant's treatment of it was fraudulent and
18 in doing that, you are entitled to keep in mind, it seems,
19 first of all, the negotiations that we showed led up to the
20 contract, secondly, the fact that the contracts in due form
21 were executed in point of fact and were executed on the
22 days that they display; third, that the auditors themselves
23 inquired about those matters and that they made critical
24 checks of two important aspects of the contracts -- first,
25 the bona fides of the purchaser, Ruderian, who was material

1 to the transaction because it was his acquisition that genera-
2 ted the profit from it and, secondly, their check of their
3 judgment that it was a legal and enforceable obligation and
4 enforceable economic event, that event in which the income
5 had captured, was measurable and the earnings process
6 substantially completed as Mr. Chazen testified; their check
7 of their judgment about those matters with an independent
8 attorney.
9

10 Now, much has been made and I want to try to put
11 it in perspective. Much has been made of the fact that these
12 matters in some respects have not been documented in the
13 work papers by notations and indeed it sometimes seems that
14 that housekeeping detail has become the whole case of both
15 of the plaintiffs.

16 But, if you look at the auditing standards which
17 have been read into the record and which Mr. Fell has testified
18 about and Mr. Chazen said he wouldn't quarrel about, you will
19 see that that is exactly what they are. They are housekeeping
20 details.

21 They are ordinary practices of putting in work
22 papers. The confirmations of transactions usually thousands
23 of accounts receivable in commercial transactions, for the
24 purpose of being able to sustain in a forum like this by
25 a regular record the fact that that check was made.

1 The fact that the check was not recorded is not
2
3 vital. The fact that the check was not put in a memorandum
4 in no way impacts upon the case that the plaintiffs have
5 to make. It is vital whether the checks in fact were made
6 and while I would prefer that there was a memorandum that
7 recorded them, you are entitled to rely on credible proof
8 from witnesses who made the checks as to whether in fact
9 they were made.

10 Now, what were those checks? The first was an
11 inquiry of Rudorian by a person who knew his reputation, by
12 a person who knew him personally well, as to his means, his
13 execution of the contract, his bona fides in doing so and his
14 commitment to go forward with it in accordance with its
15 terms. And Mr. Boyer came here and testified to his
16 exploration in detail as a professional but also as a friend
17 with Mr. Rudorian of those matters.

As to what Boyer knew and Lipkin knew through Boyer or Ruderian, I think it is important for us to go back to what Justice Frankfurter once said of the judicial kraft. He said that judges were not obliged to forget as judges what they knew as men; and I don't think that Mr. Boyer was obliged to forget as an auditor what he knew as a man of Mr. Ruderian, and Mr. Ruderian's means, and his reputation in the community, and his good faith. And when Ruderian got on the phone in a serious matter disclosed to him as such by Boyer, and responded as he did, it seems that the substance required by the audit requirements of a check of that critical transaction had in fact been concluded; and while I again say that I would as a trial lawyer vastly have preferred that they all sat down and wrote memoranda about the subject, the fact was that the check was accomplished and that you have before you believeable credible and uncontradicted evidence that in fact the check was made.

Chazen is an experienced man in the real estate field. Mr. Pollack did me the favor of extracting that from him on cross examination. Mr. Lipkin is an experienced auditor in this field, and a lawyer to boot; and they had before them these documents and they wanted to satisfy themselves because of the magnitude of the transaction that there was in fact a transaction before them; and

1 having satisfied themselves that the transaction was real
2 as to the economic substance of it by their call to Boyer,
3 they then checked with another lawyer to see whether their
4 impression, their understanding of these transactions was in
5 fact an accurate one. And again, while I could prefer
6 that they went down and got a legal opinion from Mr. Borah
7 signed, sealed, and delivered, which of course would have
8 been objected to as hearsay by Mr. Pollack, I nonetheless
9 feel that the critical thing is that they took the time,
10 they took the effort, to make the check at all.
11

12 The Court asked couldn't you have gone down and
13 shown it to him? Sure they could have gone down and showed
14 it to him. But if they were engaged in a conspiracy to
15 conceal this transaction, if they were engaged in a conspiracy
16 to distort this transaction, why make the check at all?

17 THE COURT: What about their duty to be careful?

18 MR. CRACO: They did. They were careful, your
19 Honor. First of all their duty to be careful is a legal
20 matter is not the controlling standard in a 10B5 case but
21 addressing their duty to be careful.

22 THE COURT: Well, you have an ultramares stake,
23 common law claim here, don't you?

24 MR. CRACO: I know there is but the standard there
25 is even stricter. It has to be a negligence so profound

as to be tantamount to fraud to be ultramares and that has to be, as your Honor observed at one point, an establishment of scienter. You have to show the state of mind of the auditor. But let us address your question directly.

I don't think that getting Mr. Borah to sign an opinion adds anything to the care with which the auditors transacted will check in this case. Quite plainly they would have had evidence that they had solicited that opinion. Quite plainly they would have had a document which would bear more weight and seem more heavy; but the testimony is that they presented to Borah all the details of the contract, and after many efforts we got from Mr. Lipkin a list of the details which they presented to him, and they were, I think you will agree upon reading the transcript, a fair and accurate presentation of those details, and then Borah asked them questions.

They didn't confine themselves to what they selected from the contract. They exposed themselves to Borah's questions about what the contract said; and they told him, and there is no testimony in this court, Judge, there isn't a single word of testimony in this court, that that event did not transpire. Chazen and Lipkin came here and swore that it did, and they told you how it did; and anything else is purely suppositious on the part of my brothers who

1 want to cast doubt on the transaction.

2
3 So what they did, having determined that the
4 principals were prepared to go forward by talking with
5 Firestone and with Ruderian, having formed the judgment as
6 lawyers and auditors familiar with the custom and usage in
7 respect of such contracts in California, they went and they
8 solicited perhaps an informal but nonetheless a real opinion
9 from an attorney familiar with the facts to whom they
10 presented the details of the contract, and to whom they
11 submitted answers to questions which he propounded.

12 And while we could all wish that we weren't hear
13 because there were a written opinion, and while we could all
14 wish that these work papers were in all respects in better
15 form, the fact is that the check was made, and two things have
16 to be said about the check.

17 First of all, that there is no evidence that
18 suggests that the check was not adequate, and did not
19 produce the opinion that Borah said that the transaction was
20 legal, valid and binding and enforceable in accordance with
21 its terms, and secondly, that the fact that the check was
22 made in itself, and with the Ruderian call, belies any
23 intention on the part of Lavenhol to go along with the theory
24 to which both plaintiffs here are looked, and that is that
25 Lavenhol was engaged in a conscious attempt, which Mr.

Haimoff hoped was the last such attempt in history, to help land spectators hoke up a transaction for the purpose of selling their securities.

There isn't a shred of evidence to support that, and such evidence as there is shows that they made checks that no auditor would have made if in fact that was the course they had embarked upon.

Now, having gone through the audit and having established the existence of the contract, the intention of the parties to the contract, the opinion of independent counsel with respect to the effect to be given to the contract as described to him, and there is no competent proof that the description was in any respect inadequate, having gone through that, they made a conservative judgment as to how to deal with the income treatment to be accorded that.

They refused to take all the income into the current period. They took a portion of it and they deferred \$1,795,000 of it.

How do we know that that was conservative treatment, quite apart from the fact that Mr. Chazen on the basis of his experience testified that it was? Well, I think the most eloquent testimony is the reaction of the people who got that statement.

First of all, it was clear that Firestone was unhappy

1 about it. He came here and told us he was. Scharf was un-
2 happy about it. The testimony has been unanimous to that
3 effect.
4

5 We heard Mr. Feinberg here today -- and I will
6 come back to his testimony, which is very revealing, in a
7 minute -- testifying that when he sought financial statements
8 and studied them, he in effect put the brakes on the deal,
9 on the basis of the financial statements audited by Laventhol;
10 so the testimony and I think your Honor can come to this
11 conclusion on his own, is that the treatment that was
12 accorded the income from these transactions in respect of
13 taking a portion of it into net income and deferring the
14 great majority of it, was a conservative treatment dictated
15 by the very considerations that plaintiffs have here suggested
16 to the Court required that the transaction not be recorded
17 at all; so now you get down to a question of accounting
18 judgment.

19 Was the net worth of the company, was the amount
20 of the down payment of the company, was the character of
21 the contractual arrangements, all such as to require the
22 transaction not to be recorded or were they appropriate
23 considerations in making the accounting judgment to defer,
24 as Laventhol did, the great majority of the income to
25 the period in which the closing was to take place?

1 You have heard Mr. Chazen, and you have heard him
2
3 explain how that calculation was made.

4 Judge, you are, I am sure, familiar with valuation
5 situations in which people who are called upon to impress
6 upon a thing a value, take into consideration every piece
7 of evidence that they can get to try to formulate the
8 judgment that they are required to make; and in this case,
9 the value judgment, that had to be made, was how much of
10 this transaction should be recorded as income now; and to
11 that end the auditors and the accountants had recourse to
12 everything they could get.

13 They considered Rudarian and who he was and what
14 he was doing; they considered the nature of the contract;
15 they considered the financial posture of the respective
16 parties, they considered the terms of the contract in respect
17 of down payment and in terms of penalty provisions; and all
18 of this formed part of the jigsaw puzzle which they put
19 together to determine reciprocally how much do we kick
20 over and how much do we take now.

21 And there isn't any effective evidence, your Honor,
22 in this court at this point that says that that judgment
23 was improvident, let alone fraudulent.

24 I am conscious of the passage of time here and I
25 just want to sum up my address to this aspect of the case

by saying that is incumbent upon the plaintiffs, and I include the third party plaintiff in that, to prove what they said they were going to prove, and what they claim they have proved.

THE COURT: What do you say the standard of proof is?

MR. CRACO: I say, your Honor, that the standard of proof is that both parties on all their counts have to establish by a fair preponderance of the evidence.

THE COURT: You say fair preponderance.

MR. CRACO: A fair preponderance of the evidence that the accountants in this situation committed fraud as that is determined under the cases under 10B5 and as that is defined in ultramares and I don't think that they have done it.

That they know that they have to have done it is implicit in their opening and closing statements where they claim they have done it. They call this transaction concocted. That was the word that Mr. Haimoff used. The transaction not only was not concocted but was proved to be real from testimony which we adduced, and that testimony, it seems, stands in better stead than the conclusory allegations of both my bretheren who have attempted to attack that transaction.

1
2 But let me come quickly perhaps, disappointing
3 Mr. Pollack who thought this was all I was going to talk
4 about, to two other aspects.
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MR. CRACO: Mr. Haimoff said that the misrepresentations about this concocted transaction, and I wrote down what he said, of Mr. Herzfeld, vitally misled him when he read the statement. The difficulty with that is that we know that Mr. Herzfeld never read the statement. What he did read was a line from the statement to which was appended a note which he did not read.

He testified on direct that that line confirmed the impression he gathered from the projected statements in the note and stock purchase agreement and they confirmed the impressions that he had gathered from Baird and from Kramer concerning the financial prospects of the company.

But we heard from Mr. Feinberg today that they didn't confirm his notion of what those projected statements had revealed and they didn't confirm to him the financial picture that he had been led to expect in going forward with the transaction.

So, in brief, what we say in point of fact, there was no reliance by Mr. Herzfeld on this transaction, he got it after he had bought both of his units, he got it accompanied by an explanation propagated by Firestone's company and presumably disseminated by Allen & Company along with the financial statements.

He got it in circumstances where he read Exhibit

6, the letter of explanation, and did not read the auditor's opinion and Firestone's explanation of the financials, one my properly ask which he relied on if he read the one and not the other.

The reliance was here on Baird, on Kramer, on the projected financials, on the letter from Firestone and it was explicitly not on the Laventhol financial statements.

If he did rely on the financial statement, that line extracted from the financial statement, it seems to me it is perfectly plain that he did so unreasonably. He didn't read the net profit. He said he didn't read the net profit. He didn't look at the earnings per share which in the projected statements had been vital to him. He didn't read the notes, he didn't read the auditor's report, so, your Honor, assuming for the moment, and I don't for the minute concede it, that either of my brethren have made the case of fraud against the accountant here and assuming that they had propagated a fraudulent and misleading statement, Judge, it is like they had printed it in a Peoria newspaper.

If the thing wasn't read by the investor, it could not have infected his investment judgment and we know that it did not.

Mr. Pollack suggested that if these various accounting measures had been taken that he now proposes should

1 have been taken, it would have boggled the mind of the
2 investors. Well, I doubt it because their minds were
3 curiously resistant to being boggled by what it was in
4 fact shown and Mr. Feinberg, the only one who seems in this
5 case to have seriously considered the implications of the
6 financials, recognizes that there is, indeed, a difference
7 between a net income of 350 some odd thousand dollars on the
8 one hand and of \$60,000 on the other hand and that when
9 you have diminished your net income by that magnitude in
10 the same accounting period between your unaudited and
11 your audited statements, something is afoot and he recognizes
12 that but nobody else did.

14 And what did he do when he recognized it?

15 Well, before we recognize what he did, let's figure
16 out what was going on when he arrived because what he did
17 was put on the brakes and what had been happening before
18 that was that a real head of steam had been developed by
19 Allen & Company. We know that Kramer was enthusiastic about
20 the transaction then and we know where he got that enthusiasm
21 and we know what he said to Mr. Herzfeld that led him to
22 catch that contagion.

23 Baird was not immune to the contagion. While more
24 conservative in approach and language, careful in the
25 way he explains it, the fact is that he was turned on by

1 this transaction by the prospects of a stock split by the
2 prospects of going public and he brought it to his friend,
3 Mr. Herzfeld, for the purpose of sharing his good fortune
4 with him, so turned on was he that he was prepared to take all
5 the down side risk of the transaction.
6

7 Where did he get such enthusiasm? Out of his head?
8 No. He had been to Allen & Company and Allen & Company
9 had told him about it and he had read the note and stock
10 purchase agreement and the unaudited statements and so had
11 Herzfeld.

12 So that as we go through the time in which these
13 various investors are signing on, we are in a pitch of
14 enthusiasm. Mr. Meyer testified in effect to the enthusiasm
15 with which he was approaching this thing. It was his
16 substitute for public dealing and of course it was the source
17 of Allen & Company's fee out of Firestone if in fact it went
18 through and then came Mr. Feinberg into the room and said,
19 whoa, because these things do not conform to what we promised
20 the investors.

21 These audited statements do not say what we
22 promised the investors they would say as a condition of
23 going forward with the transaction.

24 And they call up at that point Laventhol --
25 Meyer denies that that happened the first time -- and they

1
2 call up Laventhol and put the arm on Laventhol to get them
3 to change the treatment they accord the transaction in the
4 financials.

5 It's not only too conservative for Firestone
6 when the statements are delivered to him, it is not only
7 too conservative for Firestone when on about December 4th
8 they tell him what they are going to do but it is too
9 conservative for Meyer because under the circumstances,
10 his deal may be queered and what does he He calls up
11 and in a long conversation about which I think we now have
12 substantial agreement, the effort I had made to get all of
13 the income taken into the current period. There is no
14 attempt made, Mr. Feinberg didn't testify to any attempt
15 being made to knock the transaction out of the financials
16 altogether.

17 On the contrary, all the testimony seems to suggest
18 that the dissatisfaction was that the Laventhol financial
19 statements were too bearish and the result of that was an
20 effort to bend these servile accountants to the will of the
21 underwriters, an effort which I think to their credit
22 they resisted because Mr. Feinberg testified that the financial
23 statements which he said compelled him to put the brakes
24 on the deal when he walked into the room went out to the
25 investors unchanged. And so he testified.

2 But they didn't go out by themselves. They went
3 out with a letter, Exhibit 6, disseminated by Firestone,
4 explaining away the adverse implications of the audited
5 statements. And you read Exhibit 6, Judge, when you read
6 the financials, and you will see that the effort here was
7 to paper over the discontent that Feinberg and Meyer and
8 Scharf felt and Scott felt about the Laventhol financial
9 statement with an explanation not authored by Laventhol
10 which would put the best face upon it and that is what the
11 investors relied upon.

12 So, some of the investors got unhappy when later
13 on the transaction fell apart and on the eve of reorganization
14 and as we know from Mr. Lipkin's testimony at about the same
15 time that the Attorney General of the State of New York was
16 conducting an investigation of the matter, what does Allen
17 & Company do? It embarks upon an effort to buy back the
18 units from its unhappy investors and from them it takes releases
19 which exonerate them and we submit as a matter of law you
20 see, and it takes oral assignments to prosecute the claims
21 against Laventhol.

22 Now, forget for the moment the question of what
23 legal effect any such thing has and let's just consider
24 the question of whether it ever happened.

25 Here is Mr. Duff, a prestigious firm with

1 qualifications galore, who testified on my cross examination
2 that Exhibit A-22, pages 2 through 8, were prepared by him
3 or under his direction and control and fairly reflected the
4 transaction as at that date.
5

6 The first of those pages, the first page of A-22,
7 which was first prepared in point of date contains an
8 express assignment of the right to claim against Laventhol
9 and not one of the others does.

10 Now, putting aside all the legal implications,
11 why was it that Mr. Duff was able to testify that these
12 documents prepared under his supervision and control adequately
13 reflected the entire transaction when the first of them contains
14 an assignment and none of the rest of them do.

15 Why, presumably because there was broadening in the
16 area, these oral assignments. Why were they not committed
17 to writing, if the first one was? And where are all these
18 assignors? They were able to find one, who came in and
19 testified, but that was the same one who on October 23rd was
20 willing to cumulatively confirm what he had done in the
21 first place.

22 No, Judge, it is too simple to say that the assign-
23 ments of these units to Allen & Company in the course of the
24 bail out procedure that they went through for the purpose
25 of salvaging their customer relations with some people who

1 when you read the statements you will see bear very impressive
2 names indeed, it's too simple to say at this late date
3 that those transactions were in fact accompanied by some
4 magic words of assignment of the claim.
5

6 I don't believe it and I don't think there is a
7 piece of competent evidence in this case that suggests
8 that those assignments orally were ever made.
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1061a

But if they were made, to what effect were they made? They were made at a time when plainly Allen & Company was in no position to claim reliance on the financial statement. They were not made at a time when under any concoction of the circumstances, Allen & Company can be said to have been relying on the financials. So what I get back to is whether you construe the situation from Allen & Company' is at the time of the original transaction when Feinberg was telling him, "We can't go forward," and Meyer was trying to get the accounting treatment changed, or whether you take the situation at the time they got the units back from the investors in order to rescue them from their unhappiness about the transaction having fallen through, at either time, it can't be said either that Allen & Company relied upon the financial statements or if they did, that they did so providently.

THE COURT: What about the second time? Is it material that they knew by that time that there was, let's assume fraud, if they knew fraud at that time?

MR. CRACO: Yes.

THE COURT: Wouldn't they still stand in the shoes of the assignors if the assignors were innocent purchasers?

MR. CRACO: Well it seems they have got one of two positions they have to take. Either they stand in the

shoes of the assignor or that they still believe somehow or other in the Laventhol statement? But, of course, that they have professed not to do so you get back to the question of the shoes of the assignor and your Honor there is simply no proof to the state of mind of the assignors when they acquired the shares.

This is some proof of some intimation of the state of mind when they sold the units back to Laventhol -- back to Allen & Company; and to the extent there is any proof of the state of mind of the assignors when they assigned their units back to Allen & Company, it is to the effect that at that point they certainly weren't relying on the Laventhol statements, so that it is an absolute failure of proof to show that the assignors at the relevant time in any respect relied upon the Laventhol statement.

The only person in candor who has been brought in to testify to that subject was Mr. Goodman who testified in fair substance to the same kind of thing that Mr. Hersfeld testified to, that he relied upon an accumulation of things, I submit, the most important of which was the fact that Allen & Company had closed the day before it got the Laventhol statement, and had undertaken to communicate to him an explanation authored by the company of what implications of the audited statement were.

So I don't think there is any proof of the requisite investment intent on the part of the assignors of Allen & Company that enables them to come here in those shoes and claim that they have a case by way of assignment which they have in fact established.

Judge, assuming -- well, let's not assume, let's go back and say that we think that we have shown that Laventhol under the circumstances performed its audit well, it didn't do its housekeeping well, I grant you that, but that is not the test.

It made the requisite checks and it produced a conservative accounting of an event which in fact had transpired and it communicated that report to Allen & Company; and from that point on, Judge, the testimony is absolutely clear, having received the much awaited audited statements, Allen & Company and its significant investors went ahead not because of the audited statements but in spite of them, and taking every precaution along the way to explain away the adverse implications of the differences between the audited statements and the unaudited projections.

We think this is a case as I said at the beginning where counsel's characterizations of transactions are being offered instead of proof, where 20/20 hindsight is being offered instead of proof of fraud, and where there isn't any

adequate proof that any of the alleged victims suffered as a result of the claimed wrong.

And so we submit that neither at common law nor under the New York statutes nor under the federal law which they invoke of the plaintiff or the third party plaintiff made their case. And I conclude this summation if I may, your Honor, by recording on the minutes my motion to dismiss both the plaintiff's case and the third party plaintiff's case for failure to make their case a fair preponderance of the evidence.

THE COURT: I will reserve decision.

What about briefing schedule now?

How long will it take you?

MR. HAIMOFF: Two weeks, your Honor.

THE COURT: When can we get the record. I have a copy.

MR. CRACO: It's daily copy.

THE COURT: All right, two weeks is fine.

MR. CRACO: You wish us to exchange briefs in two weeks?

THE COURT: Yes, can you do that?

MR. POLLACK: Also proposed findings, your Honor?

THE COURT: Yes. Exchange briefs and proposed findings.

MR. CRACO: Could we have three weeks?

THE COURT: Yes, all right, three.

MR. CRACO: I am afraid I am in a Penn Central reorganization. They want some briefs too.

THE COURT: All right, three weeks.

MR. HAIMOFF: A week for reply, short reply, your Honor, after that.

THE COURT: Yes, yes.

THE COURT: Thank you.

MR. CRACO: And you want proposed findings.

THE COURT: Yes, I want proposed findings.

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Robert Feinberg	715			

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
37		745
38		746
39		746

REPLY AFFIDAVIT OF ALLEN AND CO., INC. AND ALLEN AND
CO. IN SUPPORT OF MOTION TO AMEND FINDINGS AND JUDG-
MENT FILED SEPTEMBER 13, 1974

1097a

United States District Court
Southern District of New York

-----X
Gerald L. Herzfeld,

Plaintiff,

-against-

Laventhol, et al,

Defendants.
-----X

71 Civ. 2209 (LFM)

-----X
Laventhol, et al,

Third-Party Plaintiffs,

-against-

Allen & Company Inc., et ano,

Third-Party Defendants.
-----X

Reply Affidavit
on Motion to
Amend Findings
and Judgment

-----X
Allen & Company et ano,

Third-Party
Counterclaimants,

-against-

Laventhol, et al,

Third-Party
Counterclaim Respondents.
-----X

State of New York)
County of New York) ss.:

Daniel A. Pollack, being duly sworn, deposes and

I submit this affidavit in reply to certain statements made in the affidavit in opposition submitted by counsel for Laventhol on the motion by Allen to amend certain findings and the judgment.

Laventhol argues that Allen is "attempting to excuse itself from the obligation to contribute to the payment of the judgment against Laventhol --- this is not so: Allen has already contributed more than one-half of Herzfeld's claim, thereby significantly reducing the Laventhol exposure and conferring a benefit on Laventhol.

Allen, at worst, was in pari delicto with Laventhol, and as such, must bear its half of the responsibility of Laventhol to Herzfeld. Since Allen has paid far more than half, it would be unfair to tax it again, thereby further distorting the proportion of dollar liability suffered by Allen vis-a-vis Laventhol. If this motion is not granted, Allen will have paid more than eight times what Laventhol has paid. Laventhol will be getting an undeserved free ride paid for by Allen.

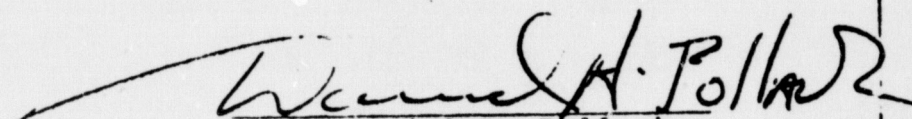
Additionally, counsel for Laventhol states or implies that Laventhol was "excluded" from the 1971 settlement negotiations by Allen with Herzfeld --- this is erroneous.

Allen did not and could not exclude Laventhol from settling or negotiating settlement with Herzfeld and,

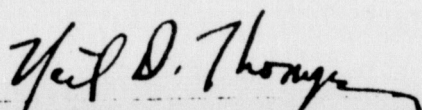
never attempted to do so. Allen was, in all respects, free to settle with Herzfeld on its own and without consultation with Laventhol. If Laventhol had wished to settle or negotiate settlement with Herzfeld, it could have done so --- its failure to do so cannot be attributed to Allen.

The statement in paragraph 8 of the affidavit in opposition that I told counsel for Laventhol in 1971 that I had been "instructed to conduct the settlement negotiations in "secret" because Allen was "angry with Laventhol" is unfounded and incorrect. Quite simply, Allen wanted to buy its peace with Herzfeld. If Laventhol had wished to do so they could have done likewise. Allen had no duty whatsoever --- legal, moral or otherwise --- to consult Laventhol regarding its settlement discussions with Herzfeld. Moreover, (lest this become a recollection contest between attorneys) the point raised in paragraph 8, even if true, would have no force or meaning in regard to this motion.

The sole question is not why Allen settled, or whether Laventhol was "excluded" from settlement negotiations between Allen and Herzfeld, but whether it is fair and just for Allen to pay eight times what Laventhol is to pay. The public policy favoring settlements would be contravened if this inequity is not corrected.


Daniel A. Pollack

Subscribed and sworn to
before me this 18th day
of June, 1974.



Received
Served
Filed

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United States District Court
Southern District of New York

Gerald L. Herzfeld,
Plaintiff,

-against-

Laventhol, et al,
Defendants.

Reply Affidavit
On Motion to
Amend Findings
and Judgment

POLLACK & SINGER
61 BROADWAY
NEW YORK, N. Y. 10006
952-0330

ATTORNEYS FOR

Allen & Company and
Allen & Company Inc.

NOTICE OF MOTION OF PLAINTIFF TO AMEND FINDINGS OF
FACT AND CONCLUSIONS OF LAW -- MEMORANDUM ENDORSE-
MENT ON MOTION FILED SEPTEMBER 13, 1974

1101a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
GERALD L. HERZFELD,

Plaintiff,

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Defendant.
----- x

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party Plaintiff,

71 Civ. 2209

-against-

(LFM)

ALLEN & COMPANY INCORPORATED and
IRWIN H. KRAMER,

Third-Party Defendants.

ALLEN & COMPANY and
ALLEN & COMPANY INCORPORATED,

Third-Party
Counterclaimants,

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party
Counter Respondent.
----- x

S I R S :

PLEASE TAKE NOTICE that the undersigned will move this
Court on June 14, 1974, for an order pursuant to F. R. C. P.
Rules 52a, 59e and 60 to amend the Court's findings of fact and

conclusions of law and the order of the Court directing entry of judgment, to increase the damages awarded plaintiffs from \$97,500 to \$153,000 and to award plaintiffs interest on the said sum from January, 1971 at the rate of 7.5% per annum to the date of payment, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

June 7, 1974

Yours, etc.

BLUM, HAIMOFF, GERSEN, LIPSON
& SZABAD

By: 

Louis Haimoff

A Member of the Firm

Attorneys for Plaintiff

Office & P. O. Address:

270 Madison Avenue

New York, New York 10016

(212) 683-6383

TO: WILLKIE, FARR & GALLAGHER
Attorneys for Defendant
Laventhol, Krekstein, Horwath & Horwath
One Chase Manhattan Plaza
New York, New York 10005

POLLACK & SINGER
Attorneys for Allen & Company and
Allen & Company Incorporated
61 Broadway
New York, New York 10006

AFFIDAVIT OF LOUIS HAIMOFF IN SUPPORT OF MOTION FILED
UNITED STATES DISTRICT COURT SEPTEMBER 13, 1974
SOUTHERN DISTRICT OF NEW YORK

1103a

----- x
GERALD L. HERZFELD, :

Plaintiff, :

-against- :

LAVENTHOL, KREKSTEIN, HORWATH & :
HORWATH, :

Defendant. :
----- x

LAVENTHOL, KREKSTEIN, HORWATH & :
HORWATH, :

71 Civ. 2209

Third-Party Plaintiff, :
:

(LFM)

-against- :
:

ALLEN & COMPANY INCORPORATED and :
IRWIN H. KRAMER, :

Third-Party Defendants. :
:

ALLEN & COMPANY and :
ALLEN & COMPANY INCORPORATED, :

Third-Party :
Counterclaimants, :

-against- :
:

LAVENTHOL, KREKSTEIN, HORWATH & :
HORWATH, :

Third-Party :
Counterclaim Respondent. :
----- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LOUIS HAIMOFF, being duly sworn, says:

I am a member of the firm of Blum, Haimoff, Gersen,

Lipson & Szabad, attorney for the plaintiffs herein.

This affidavit is submitted in support of the motion of plaintiffs to amend the Court's findings of fact and the order entered thereon by increasing the damages awarded from \$97,500 to \$153,000 with interest from January, 1971 to the date of payment.

The Court, in its decision on the issue of the damages sustained by plaintiffs, found that the plaintiffs had "purchased two units of FGL securities for \$510,000 and recouped \$357,000 when they settled their claims against Allen and the other original defendants" (p. 36).

The Court also observed that the defendant Laventhol had admitted that this sum represented plaintiffs' out-of-pocket loss. On this point, the Court stated (p. 36):

"Laventhol admits that plaintiffs are entitled to their out-of-pocket loss of \$153,000, if it is liable, but objects to both awards of interest as contrary to the proper measure of damages under the Act."

In its brief, Laventhol had conceded, as the Court pointed out, that "Laventhol does not take issue with the calculation insofar as the \$153,000 is concerned", but it contended that plaintiffs were not entitled to the 9 1/2% interest provided for in the notes.

As to the "out-of-pocket" loss of \$153,000, sustained by plaintiffs, the Court found that "both parties have overstated plaintiffs' out-of-pocket loss" in the light of evidence that "each unit of FGL securities is now worth \$27,750" (p. 37). Thus, the Court found that plaintiffs' out-of-pocket loss was \$97,500, the Court assuming that plaintiffs retained the two units which were valued at \$55,500.

1105a

Actually, the record makes clear that plaintiffs exchanged their units in the FGL Chapter XI proceeding for \$51,000 in cash and that this sum was part of the \$357,000 received by plaintiffs in settlement of their claims against Allen.

Thus, Herzfeld testified in response to questioning by the Court: (Tr., pp. 119-121):

"Q. Did you receive a sum of money in connection with that settlement?

A. Yes.

Q. How much?

* * *

THE WITNESS: You asked me how much?

THE COURT: How much did you get?

THE WITNESS: \$357,000.

Q. Did that sum include any amount that you received in connection with the plan of arrangement entered into and approved by the Firestone Corporation?

A. Yes, it did.

Q. How much was that?

A. I believe \$51,000 of the \$357,000. I'd like to verify the figure, but I believe that's it.

MR. HAIMOFF: We will stipulate it.

MR. CRACO: Subject to check."

The Plan of Composition, filed in the United States District Court for the Central District of California, entitled, "In Proceedings for an Arrangement No. 89,114, In the matter of The Firestone Group, Ltd., a Delaware corporation, Debtor", provided as follows:

"2. Class B. creditors - all creditors of this Debtor having claims in excess of \$1,250.00 shall select one of the following alternatives for satisfying their claims in full:

A. To reduce their claim to \$1,250.00 and be treated as a Class A creditor; or

B. To receive a maximum of 10% of their allowed claim or a pro rata share of the balance of the \$500,000.00 available to confirm the Plan (estimated to be approximately \$125,000.00 depending on the expenses of administration and the amount necessary to pay Class A creditors) whichever is the lesser amount; or

C. To receive for each \$10.00 of debt, one share of New Preferred Stock as described above. No fractional shares shall be issued and the number of shares shall be rounded off to the nearest full share."

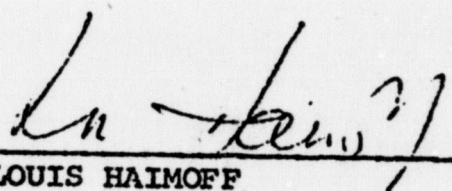
(A copy of the Plan of Arrangement is annexed hereto.)

Accordingly, the \$51,000 received by plaintiffs, as Herzfeld testified, "in connection with the plan of arrangement" represented 10% of their claim in the amount of \$510,000, which was in satisfaction of "their claims in full". The effect of the Court's decision, therefore, in reducing the amount of the plaintiffs' out-of-pocket loss by \$55,500 was to charge plaintiffs both with the value of their units and the cash sum received in exchange therefore. Obviously, when plaintiffs accepted \$51,000 in full satisfaction of their claims, they retained nothing of value. Accordingly, their out-of-pocket loss was clearly, as defendant Laventhol admitted, \$153,000.

On the subject of interest, the law is well settled, as this Court held in Collier v. Granger, 258 F. Supp. 717 (SDNY, 1966), that plaintiffs are entitled to interest at the legal rate in an action for damages for fraud and deceit, including violations of the Securities Act of 1933

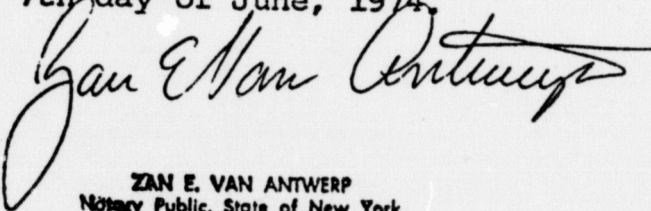
Plaintiffs therefore are entitled to interest at the rate of 7 1/2% per annum from January, 1971* to the date of payment (New York General Obligations Law, §5-501; McKinney's, Book 23 A Ann. 1973-1974, p. 43).

Accordingly, it is respectfully requested that the findings of the Court be amended to increase the damages awarded to plaintiffs against defendant Laventhol from \$97,500 to \$153,000, with interest at the rate of 7.5% per annum from January, 1971 to the date of payment.


LOUIS HAIMOFF

Sworn to before me this

7th day of June, 1974.



ZAN E. VAN ANTWERP
Notary Public, State of New York
No. 31-4066650
Qualified in New York County
Commission Expires March 30, 1975

* Interest at the 9 1/2% rate was paid through December, 1970.

**NOTICE TO CREDITORS OF AD-
JUDGED MEETING OF
CREDITORS UNDER CHAPTER XI
OF THE BANKRUPTCY ACT, ETC.
AND HEARING ON THE AMENDED
PLAN OF ARRANGEMENT**

Arrangement No. 11-114
United States District Court Central
District of California
In the Matter of THE FIRESTONE
GROUP, LTD., a Delaware corporation,
Debtor.

To the Debtor herein and to the
creditors of the above named Debtor The
Firestone Group, Ltd., a Delaware
corporation, 1820 Century Park East,
Suite 1800, Los Angeles, California 90067,
Beverly Hills, California 90211, and to all
other parties in interest in the within
matters.

(1) NOTICE IS HEREBY GIVEN that
the meeting in these matters required to be
held by Section 333 in proceedings
under Chapter XI of the Bankruptcy Act
and the hearing under Section 336 and
Section 337 of the Bankruptcy Act, and
the hearing to authorize the sale of any or
all of the assets of the estate upon such
terms and conditions as the court may
prescribe, have been continued to
September 30th 1971 at 10:00 A.M. in the
Courtroom of Referee Ronald Walker,
Room 324, U. Temple and Spring Streets,
Los Angeles, California 90012.

(2) NOTICE IS FURTHER GIVEN
that on August 18, 1971, the Debtor
filed its Amended Plan of Arrangement,
which contains a material modification
of the arrangement originally proposed
and filed on June 15, 1971. A copy
completing this notice is a copy of said
Amended Plan of Arrangement.

(3) NOTICE IS FURTHER GIVEN
that all creditors who wish to have their
claims considered in determining of the
said Debtor's Amended Plan of
Arrangement has been accepted in the
manner as provided by law must file
their claims not later than the conclusion
of the aforesaid meeting of creditors.

(4) NOTICE IS FURTHER GIVEN
that the Debtor's application to confirm
its said Amended Plan of Arrangement
herein shall be filed in the office of the
undersigned Referee not later than
September 30th, 1971, at 10:00 o'clock
A.M. and that the hearing thereon and on
all objections thereto, if any, will be held
at the aforesaid time and place. Local
Rule 318 (c) of the Bankruptcy Rules of
the United States District Court
provides:

"Objections to the confirmation of
plan of arrangement shall be in
writing and verified as provided in
Sections 181(c) of the Bankruptcy Act
and shall be served upon the debtor
and filed at least five (5) days before
the date set for the confirmation of
the plan."

A filing fee of \$10.00 is required upon
the filing of any objection to a Plan of
Arrangement.

(5) NOTICE IS FURTHER GIVEN
that in the event the said Debtor's
Amended Plan of Arrangement is not
confirmed, by reason of any of the
provisions of Section 336 of said Chapter
XI, a hearing will be held at the aforesaid
time and place to determine if the said
debtor should be adjudged a bankrupt
and bankruptcy be proceeded with
pursuant to the provisions of the
Bankruptcy Act and to determine the
appointment of a trustee and creditors'
committee, or if these proceedings
should be dismissed.

(6) NOTICE IS GIVEN, in order that
the feasibility of the said Amended Plan
of Arrangement may be determined,
that an order will be made at said
meeting adjudicating each and every
claim provided for in said Plan and that
claims entitled to priority to be
dischargeable, unless at least five (5)
days prior to the date of said meeting an
application be filed with the court and a
copy served upon Shuten & Frost, At-
torneys for the Debtor, 1820 Century
Park East, Suite 1800, Los Angeles,
California 90067, seeking a determination
of specific claim adjudicated non-
dischargeable. A hearing will be had on
such application on said day.

(7) NOTICE IS FURTHER GIVEN
that any creditor who has accepted the
Plan of Arrangement, as originally
proposed hereon, and who fails to file
with the court, at least five (5) days prior
to the date of said meeting, his rejection
of the Amended Plan of Arrangement,
shall be deemed to have accepted the
modification and the Amended Plan of
Arrangement, unless the previous ac-
ceptance provides otherwise.

Your attention is called to a recent
Amendment to Section 335 of the
Bankruptcy Act approved November 28,
1964.

"Sec. 335. Creditors, including the
United States any State, and any sub-
division thereof shall file their Proofs of
Claim before Confirmation except as
follows:

"(1) If scheduled by the debtor, a claim
may be filed within thirty days after the
date of mailing notice of confirmation to
creditors but shall not be allowed for an
amount in excess of that set forth in the
debtor's schedules; and

"(2) A claim arising from the rejection
of any executory contract or unperfected
security interest, or from the sale of an
asset, may be filed within such time as the
court may direct."

The attached is a copy of the Debtor's
aforesaid proposed Amended Plan of
Arrangement.

**AMENDED PLAN OF
ARRANGEMENT**

The Firestone Group, Ltd., a Delaware
corporation, hereinafter referred to as
"Debtor", proposes the following
arrangement with its unsecured
creditors:

**KEY OBLIGATIONS RELATING TO
PROPOSED AMENDED PLAN OF
ARRANGEMENT**

As of the filing of its Chapter XI
proceedings, Debtor had the following
purported liabilities, among others,
which are of consequence to an un-
derstanding of its proposed Plan of
Arrangement:

1. The Internal Revenue Service
IRS, contends that the Debtor owes it
approximately \$121,000.00 in back taxes.
It denies that it owes said sum in the IRS.
In addition, there is approximately
\$1,600.00 due to various other govern-
mental agencies for taxes.

2. Unsecured obligations totaling
approximately \$6,000,000.00 which are
the subject of this Plan, are described
as follows:

A. Obligations in creditors' notes, in-
cluding promissory notes, hereinafter
referred to as "creditors' notes", totaling
approximately \$5,000,000.00. These
obligations are of the type that require
by bank lending, selling of goods and/or
furnishing services to the Debtor and/or
by having filed lawsuits against the
Debtor and/or who have claims arising
from the rejection of executory con-
tracts.

B. Obligations to creditors holding
subordinated 9 1/4% promissory notes, in
the sum of \$1,000,000.00. Interest is also
owed on these notes. This type of creditor
of the future will be referred to as "Note
Creditors". These notes are subor-
dinated only to the prior payment of
monies owed to banks.

C. Obligations owed to secured
creditors in the approximate sum of
\$150,000.00.

**II. BACKGROUND MATTERS RELATING
TO PROPOSED AMENDED PLAN
OF ARRANGEMENT**

Debtor, among other businesses,
engaged in purchasing real property and
reselling same by means of syndicates.
A limited partnership arrangement
would be organized for the purpose of
acquiring real property and the various
partnerships were to hold the real
property as an investment pending any
increase in the values thereof.

Until about a year and a half ago, the
Debtor limited its activities in the State
of California under appropriate permits
issued by the California Department of
Corporations. When the Debtor decided
to expand its activities on a national
level, problems developed with the
Securities and Exchange Commission
and certain state securities ad-
ministrators concerning the holding of
seminars for prospective investors.

For approximately three weeks prior
to the filing of the within Chapter XI
proceedings the Debtor was involved in
an informal moratorium with its un-
secured creditors. An involuntary
petition in bankruptcy was filed on
March 12, 1971, against the Debtor and
the Debtor, in order to preserve its assets
and conserve costs, filed the within
Chapter XI proceedings on April 2, 1971.

**III. EFFORTS OF DEBTOR TO OBTAIN
FINANCING TO CARRY ON BUSINESS
TRANSACTIONS CONTEMPLATED
IN AID OF DEBTOR'S AMENDED
PLAN OF ARRANGEMENT**

On January 1, 1971, hereinafter
"Winograd" was elected President of
the Debtor subsequent to the filing of the
Chapter XI Proceedings. Winograd is an
attorney and a business consultant.
Winograd on behalf of the Debtor and
counsel for the Debtor have been
working with representatives of Allen &
Company, Incorporated (hereinafter
"Allen, Inc.") to arrange financing so
that a Plan can be filed with the Court.
Allen, Inc. in 1968 had assisted the
Debtor in the private placement of 9 1/4%
promissory notes hereinafter
referred to and is interested in the
Debtor continuing a business operation.
Originally Allen, Inc. had agreed subject
to certain conditions, to advance
\$1,500,000.00 to the Debtor to enable the
Debtor to continue business operations.
One of the conditions of Allen, Inc. to
making funds available was an agree-
ment being entered into between
an affiliate of E. Hutton Company, Inc.
(hereinafter "Hutton") and the
Debtor for Hutton to assume man-
agement of the affairs of the Debtor
as reorganized pursuant to the pending
Chapter XI Proceedings. Representa-
tives of Allen, Inc. and Hutton and
Winograd spent many weeks in
negotiating the Debtor's business
operation and attempting to arrive at an
understanding for Hutton to assume
management of the Debtor and such an
understanding could not be reached.

Thereafter, Winograd attempted to
find alternatives for a Plan so that Allen,
Inc. would still fund the Debtor's
business operations. Winograd has
agreed to continue on as President of the
Debtor as reorganized as a condition of
Allen, Inc. funding the Plan. The
business operations, in attempting to
assist in the reorganization of the
Debtor, Allen, Inc. estimates ex-
penses of approximately \$100,000.00
for attorneys, consultants, and ac-
countants.

Subject to the conditions hereinafter
stated, Allen, Inc. has agreed to
make available to the Debtor for pur-
poses of confirming this Plan, the sum of
\$500,000.00 and to immediately advance
to the Debtor as reorganized pursuant to
this Plan, an additional sum of
\$300,000.00 for operating funds. Allen,
Inc. shall receive for said sum 900,000
shares of common stock, \$1 par value
("New Common Stock"), of the Debtor
as reorganized pursuant to this Plan. In
addition, Allen, Inc. has agreed, subject
to certain conditions, to purchase an
additional 400,000 shares of New Common
Stock for \$400,000.00.

To accomplish this transaction with
Allen, Inc. shall be consummated upon
the Order confirming this Plan becoming
final and all conditions of Allen, Inc. as
hereinafter set forth be satisfied
(hereinafter "Effective Date"). The
conditions of Allen, Inc. are:

1. That not more than \$200,000.00 of the
\$400,000.00 to be immediately made
available by Allen, Inc. to the Debtor
shall be used for the purposes of con-
firming this Plan and that \$300,000.00
shall be available for operating funds for
the Debtor (pursuant to this Plan, the
Debtor shall be reorganized and the
Debtor as reorganized pursuant to this
Plan shall hereinafter be referred to as
the "Reorganized Debtor").

2. The immediate issuance to Allen,
Inc. pursuant to this Plan of 900,000
shares of common stock, \$1 par value,
("New Common Stock") for the money
to be immediately advanced by Allen,
Inc.

3. That the Reorganized Debtor shall in
due course issue to Allen, Inc. an ad-
ditional 400,000 shares of New Common
Stock for \$400,000.00 during the first
eighteen months following confirmation
of this Plan. Allen, Inc. also reserves the

right, subject to appropriate legal
requirements, to purchase upon all or
part of the 400,000 shares of New Com-
mon Stock to third parties as well as the
400,000 shares of New Common Stock
hereinafter.

4. That all claims against the Debtor
shall be satisfied, resolved, and
discharged in the pending Chapter XI
Proceedings. As a condition of the agree-
ment to comply with its commitment
hereunder, Allen, Inc. requires a written
opinion of its legal counsel that all claims
against the Debtor can be satisfied,
resolved and discharged in the within
proceedings. This opinion has not as yet
been rendered.

5. An understanding being reached
between Allen, Inc. and Winograd for
Winograd to continue to serve as
President of the Reorganized Debtor for
three years from date of confirmation of
the Plan and Winograd entering into
such an agreement with the Reorganized
Debtor, Allen, Inc. is of the opinion that
at this time Winograd, Attorney,
the Reorganized Debtor is best qualified
for future success. The proposed
agreement between Winograd and the
Reorganized Debtor will be submitted to
the Court for approval. The agreement
will provide that the Reorganized Debtor
shall pay Winograd for his services,
\$20,000.00 per annum payable in weekly
installments and an annual bonus of five
percent (5%) of the annual pretax
operating profit of the Reorganized
Debtor. In addition, Winograd shall
receive options to purchase 300,000
shares of New Common Stock at \$1.00 per
share from the Reorganized Debtor. The
agreement shall be submitted to the Court
prior to confirmation of the Plan.

**IV. THE ELECTION OF A NEW BOARD
OF DIRECTORS AND AN ANNUAL MEETING
OF CREDITORS**

7. The issuance of shares of Con-
vertible Preferred Stock hereinafter
referred to as "New Preferred Stock")
to Note Creditors and creditors having
substantial claims against the Debtor.
One share of New Preferred Stock shall
be issued for each \$10.00 of debt. Each
share of the New Preferred Stock may be
callable at \$10.00 per share by the
Reorganized Debtor and shall be con-
vertible into two shares of New Common
Stock. Each share of New Preferred
Stock shall have a \$10.00 preference in
the event of the subsequent dissolution,
winding up or liquidation of the
Reorganized Debtor. A preferential
dividend equal to seven percent (7%) of
the debt converted into New Preferred
Stock shall be payable annually after the
first 24 months but only to the extent
earned out of after tax operating profits
as defined in the Certificate of Deter-
mination setting forth the rights,
preferences and privileges of said
preferred stock. Dividends will be
cumulative commencing 24 months from
the date of issue to the extent earned
after the first 24 months from the date of
issue.

8. The presently issued and out-
standing shares of the Debtor's common
stock bearing reverse split, whereby one
share of New Common Stock shall be
issued in exchange for each ten (10)
shares of common stock presently
outstanding.

9. The Court passing on and approving
the issuance of the shares of New
Common Stock, the Options, and the New
Preferred Stock as provided for in the
Plan to all parties.

10. The agreement between Allen, Inc.
and the Reorganized Debtor to convert the
600,000 shares of New Common Stock
will be submitted to the Court. The
agreement will include, in part, that
Allen, Inc. will provide \$400,000.00 cash
capital to purchase an additional 400,000
shares of New Common Stock for ad-
ditional operating needs of the
Reorganized Debtor as determined by
appropriate resolution of the Board of
Directors of the Reorganized Debtor.

**CLASSIFICATION AND
TREATMENT OF INDEBTEDNESS**

1. The unsecured creditors of the
Debtor are divided into the following
classes:

A. Expenses of administration ap-
proved, allowed and ordered paid by the
Court.

B. All debts which have priority under
Section 64 a (2), (4) and (5) of the
Bankruptcy Act.

C. All non priority, unsecured claims.
2. The priority claims of the Debtor are
treated as follows:

A. Expenses of administration — the
Debtor shall pay the actual cost of
administration as fixed by the Court.

B. Labor claims — all allowed priority
labor claims shall be paid in full.

C. Tax claims — As to the above, the
Debtor disputes the sum claimed by the
IRS. The Debtor shall make the
necessary deposit to pay said IRS claim
in full if it filed and if it allowed after
hearing on an objection to such claim.
The sum deposited for the IRS claim and
not paid to the IRS shall be returned to
the Debtor.

D. Other allowed tax claims shall be paid in full.
All penalties and interest owed on
allowed tax claims shall be paid in full
from the \$200,000.00.

3. The non priority, unsecured claims
of the Debtor including claims arising
from the rejection of executory contracts
shall be treated as provided in
paragraph V of this Plan.

**PROVISIONS FOR MODIFYING OR
ALTERING THE RIGHTS OF NON-
PRIORITY, UNSECURED
CREDITORS**

1. Non priority, unsecured claims of
the Debtor which have been filed pur-
suant to the provisions of Section 353 of
the Bankruptcy Act and which have been
disputed shall be divided into two classes
and shall be paid as follows:

A. Class A creditors — all creditors of
the Debtor having claims of \$1,250.00 or
less shall be paid in full the amount of
their claims within 30 days following the
order confirming this arrangement
becoming final.

B. Class B creditors — all creditors of
the Debtor having claims in excess of
\$1,250.00 shall select one of the following
alternatives for satisfying their claims in
full:

To reduce their claim to \$1,250.00
and be treated as a Class A creditor, or
B. To receive a maximum of 10% of
the allowed claim or a pro rata share of
the balance of the \$200,000.00 available to

1. This Plan estimated to be ap-
proximately \$121,000.00 depending on the
results of administration and the
amount necessary to pay Class A
creditors whichever is the lesser
amount, or

C. To receive for each \$10.00 of debt,
one share of New Preferred Stock as
described above. No fractional shares
shall be issued and the number of shares
shall be rounded off to the nearest full
share.

Interest on New Preferred Stock shall
be computed only to the date of the filing
of this plan for the purpose of
fixing the amount of respective claims of
the Note Creditors.

Any creditor who filed a claim and
does not select one of the foregoing
alternatives shall be deemed to have
selected Alternative "B" and said
creditor shall receive a maximum of 10%
of his allowed claim or a pro rata share
of the balance of the \$200,000.00 available
to confirm the Plan, whichever is the
lesser amount.

REVESTING OF ASSETS

On the Effective Date of the Reor-
ganized Debtor shall be vested with
all its assets and shall be vested with
title to all of its assets.

VII. RETENTION OF JURISDICTION

This Court shall retain jurisdiction
following confirmation, and con-
firmation for the purposes specified
Sections 349 and 370 of the Bankruptcy
Act and until the provisions of this Plan
have been fully consummated.

MEANS OF EXECUTION OF PLAN

1. Upon all the conditions of Allen, Inc.
as set forth in this Plan being satisfied or
waived and contemporaneously with the
entry of an Order of Confirmation of this
Plan, \$500,000.00 shall be deposited with
the Court. If for any reason whatsoever
the Order of Confirmation does not
become final within eleven days after
entry thereof, the \$500,000.00 shall be
immediately returned to Allen, Inc.
Subject to the Order of Confirmation
becoming a final Order within eleven
days of entry thereof, Allen, Inc. shall
turn over to the Reorganized Debtor an
additional sum of \$300,000.00 for
operating needs.

2. The provisions of the Plan shall be
consummated as soon as possible after
the Order confirming this Plan becomes
final.

3. Upon the Order confirming the Plan
becoming final and upon performance by
Allen, Inc. of each and all of the acts and
things required of it here shall be issued
to Allen, Inc. 900,000 shares of the
Debtor's New Common Stock. Allen, Inc.
shall issue to such shareholders 1 share of its
New Common Stock at \$1.00 per share.

4. The Debtor has approximately
626,000 shares of its common stock, \$1.00
par value, presently issued and out-
standing to existing shareholders. On the
Effective Date these shares shall be
reverse split and shall be returned by
such shareholders and in exchange
therefor, the Reorganized Debtor shall
issue to such shareholders 1 share of its
New Common Stock for each 10 shares
presently outstanding. No fractional
shares will be issued and the number of
shares of New Common Stock to be issued
shall be rounded off to the nearest full
share.

5. The Reorganized Debtor shall issue
shares of its New Preferred Stock as
hereinabove described to Class B
creditors who elect to receive such New
Preferred Stock in complete satisfaction
of their claims.

**A NEW BOARD OF DIRECTORS AS AP-
PROPRIATE**

The Court shall make such orders as
may be appropriate in the premises
requiring present shareholders of the
Debtor to return Debtor's existing stock
certificates for cancellation and the
change for the new shares to be issued
them as above provided. Further, the
Court shall make such orders as may be
appropriate in the premises regarding
the issuance of the New Common Stock
to Allen, Inc. the options to Winograd,
and the New Preferred Stock to
creditors. Further, the Court shall make
such orders as may be required direct-
ing Note Creditors to return their notes
for cancellation and exchange for shares
in the New Preferred Stock of the Reor-
ganized Debtor and such other Orders as
necessary to consummate this Plan.

**IX. REJECTION OF
EXECUTORY CONTRACTS**

The Debtor shall have the right to
reject all executory contracts and shall
file a list of the contracts to be rejected
with the Court prior to the hearing on
confirmation.

Any rights or options heretofore
granted to obtain securities of the Debtor
under any agreement between the
Debtor and third parties are hereby
rejected.

X. GENERAL COMMENTS

WITH REGARD TO PLAN
The Debtor, with approval of the
Court, may insofar as it does not
materially or adversely affect the in-
terests of creditors, supply any defects
or omissions, or rectify any in-
consistencies in the arrangement or
order of confirmation, in such a manner as
may be necessary to carry out the
purpose and effect of this Plan of
Arrangement.

Dated: Los Angeles, California,
August 1, 1971.

THE FIRESTONE GROUP, LTD.,
a Delaware corporation.

By **SAM WINOGRAD,**
President of said corporation.

Debtor.

SHUTAN & TROST,
Attorneys at Law.

Attorneys for the Debtor.

Dated: August 13th, 1971.

RONALD WALKER,
Referee in Bankruptcy, 324 U. S. Court
Temple and Spring Streets, Los
Angeles, California 90012.

FILED 2000 (100)
CLERK OF THE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERALD L. HANZARD,

Plaintiff,

-agaust-

LAVENTHOL, KREKSTEIN,
HORNATH & HORNATH,

Defendants.

et al.

NOTICE OF MOTION AND
AFFIDAVIT UNDER RULES
52a, 59e and 60

ELIJA HAIMOFF, GERSEN, LIPSON & SZABAD
Attorneys for Plaintiff
Office and Post Office Address
270 Madison Avenue
New York, N. Y. 10017
NY 3-6303

Attorney for

Service of a copy of the within

is hereby admitted to

19

1109a

Sept. 13, 1977

See memorandum attached

of this date

Eliza Haimoff

A. S. D. J.

AFFIDAVIT OF ALLEN AND CO., INC. AND ALLEN AND CO. IN 1110a
SUPPORT OF MOTION FILED SEPTEMBER 13, 1974

United States District Court
Southern District of New York

-----X
Gerald L. Herzfeld, :

Plaintiff, :

-against- :

Laventhol, Krekstein, Horwath & Horwath, :

Defendant. :

71 Civ. 2209
(LFM)

-----X
Laventhol, Krekstein, Horwath & Horwath, :

Third-Party Plaintiff, :

-against- :

Allen & Company Incorporated and
Irwin H. Kramer, :

Third-Party Defendants. :

-----X
Allen & Company and
Allen & Company Incorporated, :

Third-Party
Counterclaimants, :

-against- :

Laventhol, Krekstein, Horwath & Horwath, :

Third-Party
Counterclaim Respondent. :

-----X
S i r s :

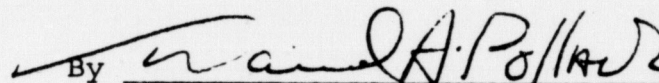
Please take notice that the undersigned will
move this Court, at a time to be set by the Court, for an

order, pursuant to Rule 52(b), Fed. R. Civ. P. amending certain findings and conclusions in the Opinion dated May 29, 1974, and to amend the judgment herein accordingly, on the ground set forth in the annexed affidavit of Daniel A. Pollack, Esq., sworn to June 5, 1974, and for such other and further relief as to the Court may seem proper.

Dated: New York, New York
June 5, 1974

Yours, etc.,

Pollack & Singer

By 

(A Member of the Firm)

Attorneys for
Allen & Company and
Allen & Company Incorporated
61 Broadway
New York, New York 10006

To:

Willkie, Farr & Gallagher
Attorneys for Defendant
Laventhol, Krekstein, Horwath & Horwath
One Chase Manhattan Plaza
New York, New York 10005

Blum Haimoff, Gersen, Lipson & Szabad
Attorneys for Plaintiff Herzfeld
270 Madison Avenue
New York, New York 10016

AFFIDAVIT OF DANIEL A. POLLACK IN SUPPORT OF MOTION 1112a
United States District Court
Southern District of New York

-----x
Gerald L. Herzfeld, :
 :
Plaintiff, :
 :
-against : 71 Civ. 2209
Laventhol, Krekstein, Horwath & Horwath, : (LFM)
 :
Defendant. :

-----x
 :
Laventhol, Krekstein, Horwath & Horwath, :
 :
Third-Party Plaintiff, :
 : Affidavit in
-against- : Support of
 : Motion under
Allen & Company Incorporated and : Rule 52(b)
Irwin H. Kramer, :
 :
Third-Party Defendants. :

-----x
 :
Allen & Company and :
Allen & Company Incorporated, :
 :
Third-Party :
Counterclaimants, :
 :
-against- :
 :
Laventhol, Krekstein, Horwath & Horwath, :
 :
Third-Party :
Counterclaim Respondent. :

-----x
State of New York)
 : ss.:
County of New York)

Daniel A. Pollack, being duly sworn, deposes and
says:

1113a

I am a member of the Bar of this Court and a member of the firm of Pollack & Singer, attorneys for Allen & Company and Allen & Company Incorporated ("Allen").

I submit this affidavit in support of a motion under Rule 52(b), Fed. R. Civ. P., to amend certain findings and conclusions in the Opinion of this Court dated May 29, 1974 and to amend the judgment accordingly.

Under the Opinion of this Court, Allen has been unfairly required to pay twice -- not just once -- for the wrongdoing this Court found was committed by its ex-officer Meyer. Indeed, under any fair analysis, Allen has already paid more than its fair share.

Assuming, arguendo, that Allen, through Meyer, was in pari delicto with Laventhol, and further assuming, arguendo, that the principle of contribution should be applied in this case, as the Court concluded, the contribution has been more than satisfied by the earlier payment by Allen to Herzfeld of \$357,000, and Allen is entitled to a credit wiping out its obligation of contribution. To hold otherwise would be to penalize and discourage litigants in the position of Allen from settling with plaintiffs in the position of Herzfeld, a result contrary to the policy of the cases and the federal securities laws.

If Allen is not granted a credit for the money it paid Herzfeld, Allen will be unfairly required to pay more than its fair share:

<u>Allen</u>	<u>Laventhol</u>
\$357,000	\$48,750
<u>48,750</u>	
\$405,750	

This result is clearly unjust and not in accord with the findings of the Court on the responsibility of Laventhol. Indeed, if Allen had not settled at all with Herzfeld, under the Opinion of this Court, the most it could have ultimately been liable for is 50% of \$454,500, (Herzfeld's loss as found by the Court) or \$227,250. As it is, if the Opinion stands unchanged, Allen will pay \$405,750 and Laventhol only \$48,750 -- this is an unjust result in a case involving the in pari delicto doctrine.

Accordingly, it is respectfully requested that the findings in the Opinion be amended, at page 54, as follows:

Delete

"To deny contribution would be to dilute the deterrent effect of the securities laws, since Allen, a participant in Laventhol's fraud, would escape responsibility for its wrongdoing."

"Since Allen has already paid Herzfeld \$357,000 in settlement, and thereby saved Laventhol from having to pay that amount to Herzfeld, the obligation of contribution which Allen owes Laventhol has been satisfied. To hold otherwise would discourage settlements of lawsuits such as these."

Delete

remainder of page 54 through page 56.

Authority for this proposition will be found in:

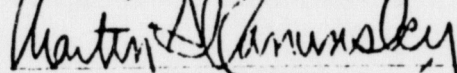
McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir. 1943) (Rutledge, J.); Blauvelt v. Village of Nyack, 141 Misc. 730, 732 (Sup. Ct., Rockland Co. 1931). See also: David D. Siegel, "Practice Commentaries", #C3019:60; McKinney's Consol. Laws of the State of New York, Vol. 7B on §§3014 to 3100, at p. 284 (1974).

Conclusion

The obligation of contribution by Allen to Laventhol has been fully satisfied, and the Opinion and judgment herein should be modified to add such a finding.


Daniel A. Pollack

Sworn to before me this
14th day of June, 1974.



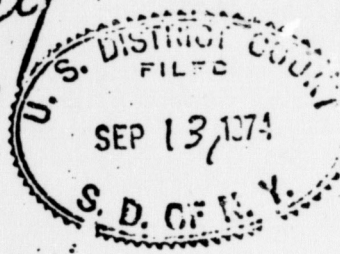
MARTIN I. KAMINSKY
Notary Public, State of New York
No. 1919
County of New York
Commission Expires March 30, 1975

OFFICE RECORD

7081-2.4

DECISION # 41169 FILED SEPTEMBER 13, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



1116a

-----x
GERALD L. HERZFELD,

Plaintiff,

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Defendant.

71 Civ. 2209-LEM

MEMORANDUM

-----x
LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party Plaintiff,

-against-

ALLEN & COMPANY INCORPORATED and
IRWIN H. KRAMER,

Third-Party Defendants.

#41169

MICROFILM

SEP 16 1974

-----x
ALLEN & COMPANY and ALLEN &
COMPANY INCORPORATED,

Third-Party
Counterclaimants,

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party
Counterclaim Respondent.:
-----x

Plaintiffs and third-party defendant, Allen & Company, Incorporated, make separate motions, under Rule 52(b), Fed.R.Civ.P., to amend certain findings of fact and conclusions of law contained in our opinion of May 29, 1974 and to amend the judgment entered thereon on June 13, 1974. We shall first consider plaintiff's motion.

Plaintiffs move to increase our award of damages to them against Laventhol from \$97,500 to \$153,000, with interest at 7-1/2% from January 1971 until the date of payment. Neither defendant opposes the motion.

There was no dispute at trial that plaintiffs had suffered an out-of-pocket loss of \$153,000, computed by deducting \$357,000, received by plaintiffs in settlement of their claims against Allen and all other defendants except Laventhol, from \$510,000, the purchase price of their Firestone units. Nevertheless, we reduced plaintiffs' damages to \$97,500 because we were under the mistaken impression that plaintiffs still retained the units, valued at \$55,500 upon the trial. It now appears that plaintiffs had surrendered the units for \$51,000 in an

arrangement among creditors in the course of Chapter XI bankruptcy proceedings against the debtor, Firestone Group, Ltd., and that the \$51,000 thus received had been included in the \$357,000 settlement receipts already deducted in computing the out-of-pocket loss.

Although there was testimony by Herzfeld upon the trial about the bankruptcy arrangement, the fact that the money thus received had already been accounted for in computing the out-of-pocket loss was never brought to our attention by counsel for any of the parties until now. We, therefore, overlooked the full significance of the bankruptcy arrangement. The undisputed fact, however, is that plaintiffs' out-of-pocket loss is \$153,000.

Plaintiffs' motion is unopposed, and in view of the undisputed fact that their out-of-pocket loss is clearly \$153,000, not \$97,500, the motion to amend is granted insofar as it seeks to increase plaintiffs' damages from \$97,500 to \$153,000.

The question of pre-judgment interest was neither raised nor argued by counsel for any of the parties. Our original opinion, therefore, at Note 31, left open that issue, and plaintiffs now seek such

interest on \$153,000, at the rate of 7-1/2% per annum from January 1971 to the date of payment. This part of the motion is also unopposed. We labor, therefore, without benefit of defense counsel's aid in a difficult and technical area of law. The threshold question is whether pre-judgment interest should be allowed on the state claims for fraud.

In New York, pre-judgment interest is awarded as a matter of right on a judgment against the defendant¹ based on a cause of action for fraud. The rate of interest on judgments is determined by statute. New York CPLR § 5004 (7B McKinney 1973), which became effective on September 1, 1972, established the rate of interest on a judgment at 6%. That statute, however, is not retroactive,² and the rate of pre-judgment interest due prior to September 1, 1972 should, therefore, be computed under General Obligations Law § 5-501 and Banking Law § 14-a,³ which then governed. The applicable rate of interest under those statutes was the "legal rate" established under the regulations of the Banking Board. That rate for the period from January 1971 to September 1, 1972 was 7-1/2%. Plaintiffs are, therefore, entitled to interest on \$153,000 at 7-1/2% from

January 1971 to September 1, 1972, and at 6% from September 1, 1972 to the date of payment. The dual rate appears to be mandated by New York law.⁴

With regard to the federal securities law claim, an award of pre-judgment interest is a matter of discretion, to be determined by a balancing of the equities.⁵ Under the circumstances of this case, considering the serious nature of the violation, as well as fair compensation to plaintiffs, we conclude that an award of pre-judgment interest is warranted. Although the rate of interest is a matter of federal law, we think that, as a practical matter, we should follow the New York rule, as discussed above, and, therefore, award the same interest as that awarded on the state claims.⁶

We turn, now, to Allen's motion to amend our original findings and the judgment entered thereon so as to relieve it from liability to Laventhol for contribution.

In our original opinion, we found Allen liable to Laventhol for contribution and awarded judgment over against Allen in favor of Laventhol for one-half the amount Laventhol was obligated to pay plaintiffs. Allen

now contends that it is entitled "to a credit wiping out its obligation of contribution" because in 1971 it paid \$357,000 to plaintiffs in settlement of their claims against Allen. Otherwise, Allen argues, it would be forced unjustly to pay more than its share of plaintiffs' damages.

Allen now makes this claim for the first time, over eight months after trial and after the filing of our opinion. Allen did not claim that its settlement with plaintiffs barred Laventhol's claim against it for contribution either in its answer to the third-party complaint or in any motion directed to the complaint, or at any time before trial or at trial, or in any of its post-trial briefs or in its proposed findings of fact and conclusions of law.

Moreover, Allen's position now is inconsistent with the position it took before Judge Palmieri when Laventhol opposed plaintiffs' motion for leave to dismiss, pursuant to stipulation, as to all defendants except Laventhol. At that time, contrary to its contention now that its settlement with the other defendants bars Laventhol's claim against it for contribution, Allen asserted that Laventhol would not be prejudiced

in any way by the dismissal of the other defendants because "any right of indemnity or contribution which Laventhol may have against any of its co-defendants can still be asserted by Laventhol by third-party action following dismissal of this action."⁷

Judge Palmieri agreed and approved the dismissal in December 1971, reasoning that no unfairness to Laventhol would result from the settlement because "Laventhol, if it is so advised, can bring third-party actions against any of the settling defendants."

In light of this history, we think it hardly equitable to allow Allen now to change its position and assert its settlement with plaintiffs as a defense to Laventhol's claim for contribution.

Allen's present position is also inconsistent with its position at trial. Allen has always maintained that neither it nor any of its officers or employees, including Lee Meyer, participated in Laventhol's violation of the securities laws or contributed to plaintiffs' damages, although the federal rules permit the⁸ assertion of alternative and inconsistent defenses. It may well be that Allen's failure to raise this defense

earlier prejudiced Laventhol's trial strategy.

Allen's conduct here is strikingly similar to that of the plaintiff in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). In that antitrust case, the Supreme Court held that the district court had not abused its discretion in ruling that Hazeltine had waived the defenses of the statute of limitations and release, because it had not asserted them until a year after trial and two months after the trial court had made preliminary findings of fact and conclusions of law. 401 U.S. at 333. Hazeltine, like Allen here, gave no hint of these defenses either in its pleadings or at trial but rather claimed that the facts did not support liability. 401 U.S. at 331-332.

Allen's defense, like Hazeltine's in Zenith,⁹ is an affirmative defense which must be raised by answer¹⁰ or reply and may be waived if not so asserted. Under the circumstances of this case, including Allen's long and inexcusable failure to raise this defense and its prior inconsistent position before Judge Palmieri, we hold that Allen has waived its settlement defense and may not now assert it.

Moreover, Allen's defense is simply not supported by the evidence. Nowhere in the papers filed in this case, or in the exhibits and testimony adduced at trial, is there any evidence to support Allen's contention that it paid Herzfeld \$357,000 in settlement of his claims. Rather, Herzfeld testified that he settled his claims with eleven defendants, including Allen & Company and Allen & Company, Incorporated, and received \$357,000 in return for his release of all eleven defendants.¹¹ Paragraph 14 of the pretrial order is to the same effect. Nowhere in the evidence or papers can we discover the precise terms of the settlement or discern who paid which sums of money to Herzfeld.

Thus, even if we assume that it would be equitable to make Laventhol credit Allen to the extent that Allen has paid more in settlement than its pro rata share of plaintiffs' damages, Allen has totally failed to demonstrate that our award of contribution to Laventhol works such an injustice. Therefore, since Allen has waived its "settlement" defense and, in any event, has failed to make the factual showing necessary to support that defense, its motion must be denied.

Accordingly:

(1) Plaintiffs' motion to amend the court's findings of fact and conclusions of law and the judgment of this court, entered June 13, 1974, is granted insofar as it seeks to increase the judgment against Laventhol, Krekstein, Horwath & Horwath to \$153,000, with interest at the rate of 7-1/2% from January 1, 1971 to September 1, 1972, and at the rate of 6% from September 1, 1972 to the date of payment, and is otherwise denied;

(2) Third-party defendant Allen's liability in contribution to Laventhol is hereby increased to \$76,500, plus one-half the interest which Laventhol must pay to plaintiffs;

(3) Allen's motion to amend the judgment and the court's findings of fact and conclusions of law is denied.

The foregoing memorandum constitutes this court's amended findings of fact and conclusions of law, in accordance with Rule 52(b), Fed.R.Civ.P.

Settle judgment within ten (10) days amending
this court's judgment, entered June 13, 1974, in accord-
ance with this memorandum.

Dated: New York, N. Y.

September 13, 1974

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

Perzfeld v. Laventhol, Krekstein,
Horwath & Horwath

71 Civ. 2209-LFM

FOOTNOTES

1

DeLong Corp. v. Morrison-Knudsen Co., 14 N.Y.2d 346, 348 (1964); Flamm v. Noble, 296 N.Y. 262, 268 (1947). See also, N.Y. CPLR § 5001(a) (7B McKinney 1963).

2

Yamamoto v. Costello, 73 Misc. 2d 692 (Sup. Ct. Nass. Co. 1973).

3

7 Doyer St. Realty v. Great Cathay Dev. Corp., 43 App. Div. 2d 476, 478 (1st Dep't 1974); Rachlin & Co. v. Tra-Mar, Inc., 33 App. Div. 2d 370 (1st Dep't 1970); Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1141-42 (S.D.N.Y. 1973).

4

7 Doyer St. Realty v. Great Cathay Dev. Corp., supra, 43 App. Div. 2d at 478.

5

Blau v. Lehman, 368 U.S. 403, 414 (1962); Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 444 (N.D. Cal. 1968).

6

Collier v. Granger, 258 F. Supp. 717 (S.D.N.Y. 1966); Chaney v. Western States Title Ins. Co., 292 F. Supp. 376, 380 (D. Utah 1968).

7

Allen memorandum in support of dismissal, at 5.

8

Rule 8(e)(2), Fed.R.Civ.P.

9

Allen argues, in effect, that its settlement with plaintiffs has released it from any liability to Laventhol in contribution. This is an "avoidance" or "affirmative" defense because it does not constitute merely a denial of the merit of Laventhol's prima facie right to contribution. Rule 8(c), Fed.R. Civ.P.; 2A J. Moore, Federal Practice ¶ 8.27[3] (1974); Schine v. Schine, 254 F. Supp. 986 (S.D.N.Y. 1966).

10

Strauss v. Douglas Aircraft Co., 404 F.2d 1152 (2d Cir. 1968); Badway v. United States, 367 F.2d 22 (1st Cir. 1966); Basko v. Winthrop Laboratories, Inc., 268 F. Supp. 26 (D. Conn. 1967).

11

We note that Allen sought, although unsuccessfully, at trial to exclude any testimony by Herzfeld concerning the terms of the settlement (Tr. 120).

Re

AMENDED JUDGMENT #74,800 AND ORDER FILED OCTOBER 8, 1974 1129a
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
GERALD L. HERZFELD,

Plaintiff,

71 Civ. 2209
(IFM)

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Defendant.
----- x

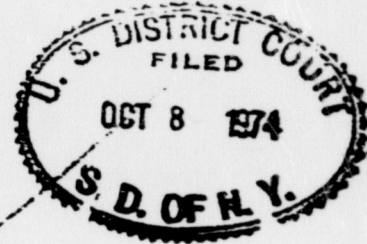
AMENDED JUDGMENT

74,800

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party Plaintiff,

-against-



THE FIRESTONE GROUP, LTD.,
ALLEN & COMPANY, INCORPORATED,
ALLEN & COMPANY, CHARLES ALLEN,
LEE W. MEYER, IRWIN H. KRAMER,
RICHARD M. FIRESTONE, MARTIN A.
SCOTT and DAVID BAIRD,

Third-Party Defendants.
----- x

ALLEN & COMPANY and ALLEN & COMPANY
INCORPORATED,

Third-Party Counterclaimants,

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party Counterclaim
Respondent.
----- x

The above-entitled action having been settled as to all
defendants, except Laventhol, on November 11, 1971, an amended
complaint was then filed, naming Laventhol as sole defendant.
Laventhol voluntarily discontinued the third-party action against
all defendants, except Irwin Kramer and Allen & Company,
Incorporated.

The action having been brought on for trial before the Honorable Lloyd F. MacMahon, United States District Judge, on October 16, 18, 19, 23, 25, 26 and 29, 1973, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on May 29, 1974, having handed down its opinion, constituting its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, and directing the Clerk to enter judgment, and the Court having on September 13, 1974 handed down its memorandum opinion amending the Court's findings of fact and conclusions of law and the judgment entered June 13, 1974, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff Gerald L. Herzfeld have judgment against defendant Laventhol, Krekstein, Horwath & Horwath in the amount of \$153,000 with costs and with interest at the rate of 7 1/2 % from January 1, 1971 to September 1, 1972 and at the rate of 6 % from September 1, 1972 to the date of payment; and it is further

ORDERED, ADJUDGED AND DECREED, that the third-party plaintiff Laventhol, Krekstein, Horwath & Horwath, have judgment against third-party defendant Allen & Company, Incorporated for damages in the amount of \$76,500, with costs and one-half the interest which Laventhol must pay to plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED, that third-party defendant Irving H. Kramer have judgment against third-party

1131a

plaintiff Laventhol, Krekstein, Horwath & Horwath, dismissing the third-party complaint; and it is further

ORDERED, that the counterclaim of Allen & Company, Incorporated and Allen & Company against Laventhol, Krekstein, Horwath & Horwath be and it is hereby dismissed, and it is

ORDERED, ADJUDGED AND DECREED, that this Amended Judgment shall serve in place and in stead of the judgment entered herein on the 13th day of June, 1974.

October 7, 1974

Elmer F. MacMillan

U. S. D. J.

JUDGMENT ENTERED - 10-9-74

Raymond Z. Burchardt
CLERK

7081-24

NOTICE OF APPEAL OF ALLEN AND CO., INC. AND ALLEN AND CO. FILED OCTOBER 18, 1974 1132a

United States District Court
Southern District of New York

Gerald L. Herzfeld,

Plaintiff,

-against-

Laventhol, Krekstein,
Horwath & Horwath,

Defendant.

Laventhol, Krekstein,
Horwath & Horwath,

Third-Party
Plaintiff,

-against-

The Firestone Group, Ltd.
Allen & Company, Incorporated
Allen & Company, Charles Allen,
Lee W. Meyer, Irwin H. Kramer,
Richard M. Firestone, Martin A.
Scott and David Baird,

Third-Party
Defendants.

Allen & Company and
Allen & Company Incorporated,

Third-Party
Counterclaimants,

-against-

Laventhol, Krekstein,
Horwath & Horwath,

Third-Party
Counterclaim
Respondent

1133a

Notice is hereby given that Allen & Company and Allen and Company, Incorporated, third-party defendants and third-party counterclaimants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Amended Judgment and each and every part thereof entered in this action on the ninth day of October, 1974.

Dated: New York, N.Y.
October 18, 1974

Pollack & Singer

By



(A Member of the Firm)

Attorneys for Allen & Company
and Allen & Company, Inc.

61 Broadway

New York, New York 10006

(212) 952-0330

To: Messrs. Blum, Haimoff, Gerson, Lipson and Szabad
Attorneys for Plaintiff
270 Madison Avenue
New York, N.Y. 10017

Messrs. Willkie Farr & Gallagher
Attorneys for Defendant and Third-Party Plaintiff
One Chase Manhattan Plaza
New York, N.Y. 10005

7081-24
119.

NOTICE OF APPEAL OF LAVENTHOL FILED NOVEMBER 6, 1974^{1134a}
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Gerald L. Herzfeld, :
Plaintiff, :
-against- :
Laventhol Krekstein Horwath & Horwath, :
Defendant. :

-----X
Laventhol Krekstein Horwath & Horwath, :
Third-Party Plaintiff, : 71 Civ. 2209
-against- : (LFM)
Allen & Company Incorporated and : NOTICE OF APPEAL
Irwin H. Kramer, :
Third-Party Defendants. :
:

-----X
Allen & Company and Allen & Company :
Incorporated, :
Third-Party :
Counterclaimants, :
-against- :
Laventhol Krekstein Horwath & Horwath, :
Third-Party :
Counterclaim Respondent. :
:

-----X

Notice is hereby given that Laventhol Krekstein
Horwath & Horwath, defendant and third-party plaintiff
above named, hereby appeals to the United States Court

1135a

of Appeals for the Second Circuit from the Amended Judgment
and each and every part thereof entered in this action on
the 9th day of October, 1974.

Dated: November 4, 1974
New York, New York

WILLKIE FARR & GALLAGHER

By Louis A. Jacob
(A Member of the Firm)

Attorneys for Defendant and
Third-Party Plaintiff
Laventhol Krekstein Horwath
& Horwath
Office and P.O. Address
One Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

TO: BLUM HAIMOFF GERSON LIPSON
& SZABAD
Attorneys for Plaintiff
Gerald L. Herzfeld
270 Madison Avenue
New York, New York 10016

POLLACK & SINGER
Attorneys for Third-Party
Defendants
Allen & Company, and
Allen & Company, Inc.
61 Broadway
New York, New York 10006

STIPULATION SUBMITTING TRUE COPY FILED NOVEMBER 25, 1974 1136a
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GERALD L. HERZFELD, :
 :
Plaintiff, :
 :
-against- :
 :
LAVENTHOL, KREKSTEIN, HORWATH & :
HORWATH, : 71 Civ. 2209
 : (LFD)
 :
Defendant. :
 :
-----X

STIPULATION

-----X
LAVENTHOL, KREKSTEIN, HORWATH & :
HORWATH, :
 :
Third-Party Plaintiff, :
 :
-against- :
 :
ALLEN & COMPANY INCORPORATED and :
IRWIN H. KRAMER, :
 :
Third-Party Defendants. :
 :
-----X

-----X
ALLEN & COMPANY and :
ALLEN & COMPANY INCORPORATED, :
 :
Third-Party :
Counterclaimants, :
 :
-against- :
 :
LAVENTHOL, KREKSTEIN, HORWATH & :
HORWATH, :
 :
Third-Party :
Counterclaim :
Respondent. :
 :
-----X

IT IS HEREBY STIPULATED AND AGREED by and between
the undersigned, the attorneys for the respective parties
hereto, that copies of the following document shall be
transmitted to the United States Court of Appeals for the

Second Circuit as part of the record on appeal in the above-^{1137a}
captioned case:

<u>DESCRIPTION</u>	<u>DATE FILED</u>
1. Memorandum of Defendant Laventhol, Krekstein, Horwath & Horwath in Opposition to Proposed Settlement	December 15, 1971

Copies of the foregoing are necessary to complete the record because the originals, while docketed, could not be located in the files of the Clerk of the United States District Court for the Southern District of New York.

Dated: New York, New York
November 22, 1974

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& SZABAD

By Paul S. Blum
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DEFENDANT LAVENTHOL'S MEMORANDUM OF LAW ANNEXED TO
 FOREGOING STIPULATION FILED DECEMBER 15, 1974
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 GERALD L. HERZFELD, :
 Plaintiff, : 71 Civ. 2209 (ELP)
 -against- :
 THE FIRESTONE GROUP, LTD., et al., :
 Defendants. :
 -----X

DEFENDANT, LAVENTHOL KREKSTEIN, HORWATH &
 HORWATH'S MEMORANDUM OF LAW IN OPPOSITION
 TO THE PROPOSED SETTLEMENT BY OTHER
 DEFENDANTS AND IN SUPPORT OF TERMS AND
CONDITIONS TO SUCH SETTLEMENT

WILLKIE FARR & GALLAGHER
 Attorneys for Defendant
 Laventhol Krekstein Horwath & Horwath

LOUIS A. CRACO
 JACK DAVID,

Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
GERALD L. HERZFELD,	:	
	:	71 Civ. 2209
Plaintiff,	:	(ELP)
	:	
-against-	:	
	:	
THE FIRESTONE GROUP, LTD., et al.,	:	
	:	
Defendants.	:	
-----X		

DEFENDANT LAVENTHOL KREKSTEIN HORWATH &
HORWATH'S MEMORANDUM OF LAW IN OPPOSITION
TO THE PROPOSED SETTLEMENT BY OTHER
DEFENDANTS AND IN SUPPORT OF TERMS AND
CONDITIONS TO SUCH SETTLEMENT.

PRELIMINARY STATEMENT

By reason of the culmination of the surreptitious negotiations between the plaintiff and certain of the defendants in this action and the proposed stipulation of settlement resulting therefrom, defendant Laventhol Krekstein Horwath & Horwath finds itself in the difficult position of having to protect itself against the consequences of a settlement by all other parties on a basis and on terms which still remain undisclosed. The difficulty of this situation is accentuated by the fact that, as shown by the affidavit of Louis A. Craco

submitted together with this memorandum, the most egregious conduct charged in the complaint was performed by other defendants and not by defendant Laventhol Krekstein Horwath & Horwath.

By reason of the foregoing, defendant Laventhol Krekstein Horwath & Horwath strongly opposes the proposed settlement. However, if the Court is inclined to approve of the settlement, defendant Laventhol Krekstein Horwath & Horwath urges the Court to impose upon the settlement the terms and conditions specified in paragraph 4 of the affidavit of Louis A. Craco submitted in opposition to the settling parties' proposal.

POINT I

THE DEFENDANTS IN THIS ACTION SHOULD
ALL BE SUBJECT TO FULL DISCOVERY AS
PARTIES UNDER THE FEDERAL RULES OF
CIVIL PROCEDURE.

The need to have full discovery of each of the defendants named as parties in this action is evident from the charges in the complaint. Indeed, the most egregious wrongdoing charged in the complaint is attributed to those defendants who now seek to impose the burden of defending upon defendant Laventhol Krekstein Horwath & Horwath and to deny defendant Laventhol

Krekstein Horwath & Horwath the discovery to which it should be held entitled.

It is vital that defendant Laventhol Krekstein Horwath & Horwath be permitted to have discovery against the other defendants to this action. Such discovery would be necessary, as a matter of course, in an action like this, in which sweeping charges of fraud are made against a variety of parties connected with a securities transaction. Such discovery is particularly important to a defendant like the accountants Laventhol Krekstein Horwath & Horwath, who had no direct dealings with the plaintiff who alleges that false and misleading statements were made to him. It is vital that defendant Laventhol Krekstein Horwath & Horwath have discovery of the other defendants in this action as parties in this situation because defendant Laventhol Krekstein Horwath & Horwath has reason to believe that those defendants have information which they will reveal only if they are forced to do so for the reason that such information will totally exonerate defendant Laventhol Krekstein Horwath & Horwath but will prove that such defendants are guilty of the egregious conduct which is charged in the complaint.

The imposition of terms and conditions which require the settling defendants to remain in the case as third-party defendants or if not named as third-party defendants, to submit to discovery as parties under the Federal Rules of Civil Procedure, is especially appropriate in this action. As shown in Point II herein, if the claims of securities law violations charged against the settling defendants are approved, they will be liable, as a matter of federal policy, to contribute to the satisfaction of any judgment which the plaintiff may recover. That same policy requires them to be subject to either third-party claims by defendant Laventhol Krekstein Horwath & Horwath or to full discovery under the Federal Rules of Civil Procedure with a view to determining whether they should be brought in as third-party defendants.

POINT II

IT IS AGAINST PUBLIC POLICY TO
PERMIT THE DEFENDANTS IN THIS
ACTION TO ESCAPE LIABILITY FOR
THEIR PROPER SHARES OF ANY JUDGMENT
WHICH PLAINTIFF MAY RECOVER.

In the event that plaintiff is successful in obtaining a Judgment in this action, each defendant who is held liable for the wrongdoing charged and proved will be responsible to contribute to the satisfaction of the Judgment. The

liable would be required to contribute to the satisfaction of the Judgment. The reason for this result is that the federal securities laws permit the imposition of civil liability as a mode of encouraging diligence and compliance with the requirements of the statute by persons engaged in securities transactions and will not permit such persons to "nullify their 'liability for compensatory damages' by leaving the whole of the burden" to another party. Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. at 958.

The policy of the federal securities laws underlying the rule that joint tortfeasors must be held accountable to contribute to the judgment recovered would be thwarted were this Court to permit the defendants to remove themselves as parties to this action and forever escape any judgment of liability.

CONCLUSION

For the foregoing reasons, the Court should disapprove of the proposed settlement or, in the alternative, the Court should modify the proposed settlement by imposing upon it the terms and conditions set forth in paragraph 4 of the affidavit

1144a

of Louis A. Craco.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
Laventhol Krekstein Horwath &
Horwath

Of Counsel:

Louis A. Craco
Jack David

1145a

policies underlying the federal securities laws have been held to require defendants in an action who are held to have committed securities law violations to contribute as joint tortfeasors to the satisfaction of the judgment.

Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd 442 F.2d 1346 (2d Cir. 1971).

There can be no question that Laventhol Krekstein Horwath & Horwath would insist upon contribution from the other defendants in this action in the event of the plaintiff obtaining any Judgment. It is clear that such contribution is permissible under the provisions of the federal securities laws which plaintiff claims to have been violated by the defendants. As Judge Doyle said in deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-816 (D. Colo. 1968),

"those sections of the (securities acts) which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers. (Citing § 11 of the 1933 Act, 15 U.S.C. § 77k, and §§ 9 and 18 of the 1934 Act, 15 U.S.C. § 78i and 78r.) Since the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under § 10(b)."

And in the light of Globus, Inc. v. Law Research Service, Inc., supra, there is no question that those defendants shown to be

Original OFFICE RECORD

7081-28

CERTIFICATE OF CLERK FILED DECEMBER 18, 1974 1146a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
GERALD L. HERZFELD,

Plaintiff,

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Defendant.

71 Civ. 2209

JUDGE MacMAHON

CLERK'S CERTIFICATE

-----X
LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party Plaintiff,

-against-

ALLEN & COMPANY INCORPORATED and
IRWIN H. KRAMER,

Third-Party Defendants. :
-----X

ALLEN & COMPANY and
ALLEN & COMPANY INCORPORATED,

Third-Party Counterclaimants

-against-

LAVENTHOL, KREKSTEIN, HORWATH &
HORWATH,

Third-Party
Counterclaim
Respondent.

I, RAYMOND F. BURGHARDT, Clerk of the District

Court of the United States for the Southern District of
New York, do hereby certify that the certified copy of
docket entries lettered A-G, and the original filed papers
numbered 1 through 125 inclusive, constitute the record on

appeal in the above-entitled proceeding; except for the 1147a
following missing documents:

DATE FILED

December 15, 1971

PROCEEDINGS

Memorandum of Defendant
Laventhol, Krekstein,
Horwath & Horwath in
Opposition to Proposed
Settlement

IN TESTIMONY WHEREOF, I have caused the seal of
the said Court to be hereunto affixed, at the City of New
York, in the Southern District of New York, this 25
day of November, in the year of our Lord, One thousand
nine hundred and seventy 74, and of the Independence of
the United States the 99 year.

S/ Raymond F. Burchard
Clerk of the Court